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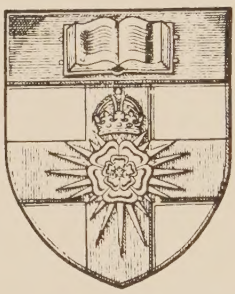

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re NEW YORK TAXICAB COMPANY, LIMITED. SEQUIN *v.* THE COMPANY.

SWINFEN EADY J.

1912

Oct. 28, 29.

[1911 N. 697.]

Company—Debentures—Jeopardy—Meaning of Jeopardy—Trust Deed—Power of Modification—Majority of Debenture-holders—Debentures payable pari passu—Resolution sanctioning Sale by Company of all its Assets and Division amongst Debenture-holders accepting Lowest Price—Invalidity.

Where a company is not being pressed or threatened by outside creditors, and there is no risk of its assets being seized on their behalf, the mere fact that the security of the debenture-holders is very inadequate is not a sufficient reason for appointing a receiver on the ground of jeopardy.

In re Victoria Steamboats, Ld. [1897] 1 Ch. 158, distinguished.

Debentures were issued under a trust deed providing for their payment pari passu. The provisions of the trust deed might be modified by a resolution passed by a three-fourths majority of the debenture-holders in general meeting:—

Held, that it was not competent for such a majority to sanction a sale by the company of all its assets and a division of the proceeds not rateably amongst all the debenture-holders, but amongst those willing to accept the lowest price for their debentures.

WITNESS ACTION.

The plaintiff was the holder of twenty-four first mortgage debentures of 20*l.* each in the above company, which was incorporated on July 5, 1910, with a capital of 506,000*l.* on the reconstruction of an old company of the same name incorporated in 1907.

SWINFEN EADY J.

1912

NEW YORK TAXICAB COMPANY, LIMITED, *In re.*

SEQUIN *v.* THE COMPANY.

The company was then virtually the owner of a large number of taxicabs and a valuable leasehold garage in New York, but in order to avoid certain difficulties in the local law these were actually vested in an American company of the same name without the word "Limited" duly incorporated under the local law, the shares of which were all held by the English company.

In July, 1910, the English company created an issue of 6 per cent. first mortgage debentures to the amount of 184,000*l.*, of which 179,340*l.* was now outstanding, making the annual interest 10,760*l.* These were secured on the English company's undertaking and assets including the taxicabs and the garage by a trust deed dated July 30, 1910. The trust deed and the form of debenture both provided for the payment of the debenture-holders pari passu.

Clause 13 of the trust deed provided that the security should become enforceable on the following events, namely, default in payment of principal, three months' default in payment of interest, a winding-up, the appointment of a receiver if the appointment was in the trustees' opinion prejudicial to the security, a distress or execution, default in performance of covenants or conditions, and stoppage of payment or cesser of business.

Clause 17 of the third schedule provided as follows:—

"A general meeting of the debenture-holders shall in addition to the powers hereinbefore given have the following powers exercisable by extraordinary resolution namely:—

"(1.) Power to sanction the release of any premises affected by these presents:

"(2.) Power to sanction any modification or compromise or any arrangement in respect of the rights of the debenture-holders against the company or against its property whether such rights shall arise under these presents or otherwise and in particular (but without limiting in any way the general power conferred by this sub-clause) power to sanction an agreement for postponing or accelerating the time for payment of the principal moneys or interest payable in respect of the debentures or any part thereof or for reducing the rate of interest or for the capitalisation thereof, or for permitting the creation of any charge or mortgage in

priority to the debentures or ranking pari passu therewith or the acceptance in satisfaction of the debentures of any shares debentures or debenture stock of this company or any other company formed or hereafter to be formed:

"(3.) Power to assent to any modification of the provisions contained in these presents which shall be proposed by the company and assented to by the trustees."

By clause 19 an extraordinary resolution meant a resolution passed by a three-fourths majority of the persons voting on a show of hands or by a three-fourths majority in value on a poll if demanded.

On December 15, 1910, the Law Car and General Insurance Corporation, Limited, with whom the company was insured against taxicab accidents, went into compulsory liquidation, and the company had to meet numerous accident claims out of its own resources. Owing to this failure and to competition and the loss occasioned by a cab strike in October, 1910, the company was carrying on business at a heavy loss. The following steps were taken to meet these difficulties.

In February, 1911, with the sanction of the debenture-holders in general meeting, the company sold its taxicabs, stock, and machinery in New York to the Mason Seaman Transportation Company, a well-established and substantial company in New York, for 8334 second preferred 9 per cent. shares of $100 each and 12,666 common shares of $100 each, which were transferred to the trustees. At the same time it underlet the garage to the Mason Seaman Company at a rent of $32,000 a year, the underlessees also paying the ground rent. The head lease was of considerable value and was renewable every ten years at an increased ground rent. It was entered in the balance-sheet as worth 70,000*l.* and there was evidence that it was worth quite 50,000*l.* The English company was liable for outside repairs, but no claim had yet arisen in that respect.

On June 17, 1911, a general meeting of debenture-holders passed a resolution postponing payment of the debenture interest payable on January 1 and July 1, 1911, and January 1 and July 1, 1912, to January 1, 1913. The payment of the interest due on January 1, 1911, had been postponed to July 1, 1911, by a

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previous meeting of December 31, 1910. The meeting also sanctioned a charge of $30,000 on the rent of the garage in priority to the debentures.

The following resolution, hereinafter called resolution A, was also passed:—"That this meeting sanctions the sale by the company of all or any part of its assets and the application of the proceeds of any such sale including the sale of any shares or stock owned by the company in the Mason Seaman Transportation Company and of the garage in New York now sub-let to that company to the redemption of the debentures secured by the above mentioned trust deed by purchase, the particular debentures to be redeemed to be those offered to the company at the lowest price in response to an invitation for tenders addressed by the company to all the debenture-holders."

The meeting also authorized the trustees to concur with the English company or American company in executing a deed supplemental to the trust deed modifying the provisions thereof so far as necessary to give effect to these resolutions and also any other releases or documents necessary to give effect thereto.

On August 22, 1911, the company borrowed $30,000 from the Crédit Lyonnais and gave them a charge on the garage rent. This loan would be paid off out of the rent by the end of 1912.

On May 14, 1912, a general meeting of the debenture-holders sanctioned a further charge to secure a loan of $60,000 from the Caisse Générale des Prêts Fonciers et Industriels. The first payment under this loan was to be made on January 15, 1913, and it would be discharged out of the rent in the next two years.

The assets of the company therefore now consisted of the Mason Seaman shares, the leasehold garage subject to the two temporary charges, and a right of proof against the Law Car Company for about 30,000*l.* It was believed that the Law Car Company would pay from 1*s.* 6*d.* to 2*s.* in the pound. The Mason Seaman Company had not paid a dividend on its second preferred shares for 1911, but the accounts up to date shewed that a dividend of 3 per cent. could be paid for 1912, and this had been informally promised by the directors. This would produce 5000*l.* for the English company. On the other hand there were now only three accident claims outstanding against

the company, and there was evidence that they could be settled probably for $4000, or at all events that $6000 would be a handsome settlement. After these claims were settled a sum of 600*l.* would become payable to Mr. Ducasse, a director, for his services in representing the English company on the board of the Mason Seaman Company for five years certain from November, 1911. His remuneration on that board was purely nominal, and the English board had only been able to secure his services for the five years by means of this retaining fee. His services had proved most valuable, so that his retainer on these terms was more than justified.

In this action the plaintiff on behalf of himself and all other first mortgage debenture holders alleged that the company's assets were in jeopardy and asked for a receiver. He also claimed an injunction to restrain the company and the trustees from acting on resolution A and from entering into any deed altering or amending the trust deed in accordance with that resolution.

Micklem, K.C., and *W. R. Bisschop*, for the plaintiff. The company is manifestly in low water and its assets if now realized would be wholly insufficient to satisfy the claims of the debenture-holders. The security is therefore in jeopardy and we are entitled to a receiver.

We also ask for an injunction to restrain the defendants from acting on resolution A. We do not impeach the bona fides of any of the resolutions, but resolution A is clearly invalid. We took our debentures under a trust deed and form of debenture expressly providing for payment pari passu, and the majority of debenture-holders cannot alter our rights and compel us to accept payment by tender. Such a modification would be wholly inconsistent with the trust deed.

Hon. Frank Russell, K.C., and *H. E. Wright*, for the defendants. The principal of the debentures is not due, and the interest is not payable till January 1, 1913. The company is still carrying on its business within clause 13—*In re Borax Co.* (1)—and no event has occurred to make the security enforceable. The plaintiff is therefore driven to say that his security is in

(1) [1901] 1 Ch. 326.

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jeopardy. But all he attempts to prove is that the company is not prosperous and that his security is insufficient. But the insufficiency of a security is not jeopardy to that security. A security is in jeopardy when there is danger of outside creditors seizing the assets as in *In re London Pressed Hinge Co.* (1) There is nothing of that sort here. The assets, whatever their value, are quite safe, and the security however insufficient is in no sense in jeopardy.

The plaintiff next impeaches resolution A. It was really only intended to sell the garage, and there was every prospect that the whole purchase-money could have been applied in the redemption of debentures at 50 per cent. The other assets would have been applied rateably under the trust deed. But the resolution as drawn no doubt goes to the whole of the assets, and must be dealt with as it stands, i.e., as authorizing the sale of all the assets and their application by tender among the debenture-holders. Now such an application of the proceeds of sale could clearly have been provided in the original trust deed. An application pari passu was in fact provided, and the debenture-holders no doubt took their security on that footing. But they also took subject to any modification of their rights by extraordinary resolution passed by a three-fourths majority of a debenture-holders' meeting under clause 17 of the third schedule. Resolution A was duly passed and there is no suggestion of mala fides. All the debenture-holders are treated alike. They merely have to tender instead of being paid pari passu.

[SWINFEN EADY J. The effect would be that all the assets would be sold and divided amongst those who sent in the lowest tenders, leaving the remainder out in the cold. It is hopelessly unarguable.]

The same result would have occurred if resolution A had formed part of the original trust deed. There is nothing ipso facto unjust in a distribution by tender.

Micklem, K.C., in reply. Two years' interest amounting to 21,520*l.* is now in arrear, though payment has been postponed to January 1, 1913, when another instalment of 5380*l.*, making altogether 26,900*l.*, will become payable. There will only be a

(1) [1905] 1 Ch. 576.

possible 5000*l.* dividend to meet it, and in ordinary parlance the security is in jeopardy although it is not threatened by outside creditors. The word "jeopardy" must not be construed too narrowly. In *In re Victoria Steamboats, Ld.* (1) Kekewich J. said: "It would be giving a very narrow meaning to the word 'jeopardy' to hold that because the security of the debenture-holders will be preserved they ought not to take care of themselves. That being so, I can appoint a receiver. That is mere protection."

Hon. Frank Russell, K.C., in rejoinder. In that case interest was in arrear and payment had not been postponed, a creditor had obtained judgment, other creditors had presented a winding-up petition, and liquidation was imminent. That was a clear case of jeopardy. There is nothing of the sort in the present case.

SWINFEN EADY J. (after stating the facts). The plaintiff alleges that his security is in jeopardy and asks for a receiver. Two years' interest is no doubt in arrear, but payment of that has been duly postponed by the debenture-holders' meeting to January 1, 1913, so that no interest is payable at present. Again, the sale of the taxicabs to the Mason Seaman Company was duly authorized and is beyond reproach. The real ground of the plaintiff's application is that his security appears to be insufficient to pay the principal or interest of the debentures. He points out that the Caisse Générale will take the garage rent for the next two years, and there is also the 600*l.* to be paid to Ducasse, and the only available income will be the dividend on the Mason Seaman shares which if the directors' informal promise is fulfilled will pay 5000*l.* in January, 1913. In these circumstances the plaintiff alleges that his security is in jeopardy. But is there in fact any such jeopardy as to require the interference of the Court? The assets are in no danger of being seized. No creditor is pressing or threatening proceedings. The Caisse Générale merely take their hypothecated rent. The only other liabilities are for directors' fees, the 600*l.* payable to Ducasse, and the reduced accident claims which will be settled for $4000

(1) [1897] 1 Ch. 158, 162.

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to $6000. The company is not in any pecuniary difficulty. No doubt it cannot pay the debenture interest in full yet and will not be able to do so for some considerable time. But it is always open to a meeting of debenture-holders to give further time for payment. The assets are not in jeopardy in the sense that there is any risk of their being seized or taken to pay claims not really prior to the claims of the debenture-holders. The company is a going concern. No interest is payable till January 1, 1913, and if necessary a further postponement may be authorized. The security is not yet enforceable according to its tenor, and the fact that if now realized it would be wholly insufficient to pay the principal and interest in full is not a sufficient reason for appointing a receiver on the ground of jeopardy. In *In re Victoria Steamboats, Ld.* (1) the interest was in arrear and payment had not been postponed. Creditors were threatening, a winding-up petition was pending, and compulsory liquidation was imminent. That was a clear case of jeopardy. There is nothing of the sort in the present case, and the plaintiff has entirely failed to make out any kind of jeopardy to his security entitling him to ask for a receiver.

The plaintiff then complains of resolution A, and in my opinion his objection is well founded. It is not competent for a majority of the debenture-holders to sanction a sale by the company of all its assets and a division of the proceeds not rateably amongst all the debenture-holders, but amongst those willing to accept the lowest price for their debentures. Evidence has been given that it was really only intended to sell the garage. That was expected to realize 50,000*l.*, which would have been applied in extinguishing 100,000*l.* debentures at 50 per cent. leaving the Mason Seaman shares for the rest of the debenture-holders. But though that is all that may have been contemplated, the resolution in terms went to the whole property, and must be dealt with as it stands. It is clearly not competent for a majority of debenture-holders to sanction a sale of all the company's assets and a division of the proceeds amongst some only of their number, and the plaintiff is therefore entitled to an injunction to restrain this being done.

(1) [1897] 1 Ch. 158.

Though full effect is given to majority clauses in debenture trust deeds, it would be going far beyond any previous authority to hold that a majority of debenture-holders can in effect determine to divide the property amongst some only of their number. Such a proceeding is not authorized by the terms of the trust deed, and is not allowed by law. See *Menier* v. *Hooper's Telegraph Works.* (1)

The plaintiff is entitled to an injunction to restrain the defendants from carrying out resolution A, but he fails as to his claim for a receiver. The plaintiff will have the general costs of the action except so far as increased by his claim for a receiver on the ground of jeopardy. Those costs he must pay, with the usual set-off.

Solicitors: *Tarry, Sherlock & King; Ashurst, Morris, Crisp & Co.*

G. R. A.

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[1910 P. 1161.]

Marriage Settlement—After-acquired Property—Covenant to settle—Acquisition of Property—Effect of Covenant in Equity—Persons within Marriage Consideration—Non-assignment of Property—Remedies of Trustees—Lapse of Time—Statutes of Limitation.

A marriage settlement of 1859 contained the usual covenant by the husband and wife to settle the wife's after-acquired property of the value of 100*l.* or upwards.

In 1879 the wife received 285*l.* and paid it into her husband's banking account, on which she had power to draw. Part of it was shortly after invested in two bearer bonds which remained at the bank till the husband's death in 1909 and were now in his executors' possession:—

Held, that the moment the wife received the 285*l.* it was specifically bound by the covenant and was consequently subject in equity to a trust enforceable in favour of all persons within the marriage consideration, and therefore, notwithstanding the lapse of time, the trustees were entitled on behalf of those persons to follow and claim the bonds as trust property, though their legal remedy on the covenant was statute-barred.

Principles stated in *Smith* v. *Lucas* (1881) 18 Ch. D. 531, 543;

(1) (1874) L. R. 9 Ch. 350.

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Collyer v. *Isaacs* (1881) 19 Ch. D. 342, 351; and *In re D'Angibau* (1880) 15 Ch. D. 228, 242, applied.

Spickernell v. *Hotham* (1854) Kay, 669, 675; and *In re Plumptre's Marriage Settlement* [1910] 1 Ch. 609, 616, distinguished.

ACTION.

By an ante-nuptial settlement dated May 3, 1859, and made between the wife's father of the first part, the wife of the second part, the husband of the third part, and the trustees of the fourth part, separate funds belonging to the husband and wife were respectively settled on certain trusts for the benefit of the husband and wife and after the death of the survivor on the usual trusts for the children or issue of the marriage.

It was further declared by the several parties thereto, and each of them the husband and the wife for himself and herself, his and her executors and administrators, thereby covenanted with the trustees, their executors, administrators, and assigns, that if the wife then was or if at any time or times during the intended coverture she or her husband in her right should become beneficially entitled by descent, transmission, devise, bequest, gift, representation, purchase or otherwise to any real or personal property of the value of 100*l.* or upwards for any estate or interest whatsoever (except jewels and other articles therein mentioned), then and in every such case the husband and wife and their respective heirs, executors, and administrators and all necessary parties should at the cost of the trust estate as soon as circumstances would admit and to the satisfaction of the trustees convey, assign, surrender and assure the said real or personal property or otherwise cause the same to be well and effectually vested in the trustees upon trust for sale and conversion, the proceeds to be held on the trusts of the wife's fund.

There were ten children of the marriage, nine of whom were still living.

On November 13, 1879, the wife received a present of 285*l.* from her mother. This amount was bound by the after-acquired property clause and ought to have been paid to the trustees. This was not done, but the amount was paid into Messrs. Parsons & Co.'s Bank, Oxford (since incorporated with Barclay & Co., Limited), to the credit of an account standing in the

husband's name, but upon which the wife had authority to draw. For many years nearly all the cheques upon the account were in fact drawn by her.

On or about December 16, 1879, part of the 285*l.* was invested in the purchase of two Cape of Good Hope 4½ per cent. bearer bonds or debentures of 100*l.* each, numbered respectively 9668 and 10195. The interest on these bonds was regularly collected by the bank and credited to the account. The bonds remained at the bank until the husband's death on March 8, 1909, and were now in the possession of his executors.

This action was brought by the present trustees of the settlement against the husband's executors claiming a declaration that they were entitled to the bonds under the after-acquired property clause, an order for delivery, and payment of interest received by the executors since the husband's death.

The plaintiffs alleged and the defendants admitted that the husband was possessed of the bonds at his death.

The defendants relied on the Statutes of Limitation. They also pleaded laches and acquiescence, but abandoned this plea at the hearing.

A document in the husband's handwriting, being a list of securities at the bank on August 12, 1880, was produced, and in that list the bonds were entered as belonging to the wife. The purchase-money for these bonds and one other bond bought by the wife was entered in the pass-book as a payment to the wife, namely, "Mrs. Bliss 275*l.* 17*s.* 6*d.*" It was not in fact disputed that a portion of the 285*l.* was clearly traced as invested in and now represented by the two Cape bonds, and at the hearing it was (for the purposes of this action) admitted that the bonds were so purchased and belonged to the wife.

Micklem, *K.C.*, and *Pepys*, for the plaintiffs. The moment the wife received the 285*l.* it was specifically bound by the covenant, and a trust enforceable in favour of all persons within the marriage consideration was created in equity: *Smith* v. *Lucas* (1); *Collyer* v. *Isaacs*. (2) The trustees were and are entitled to follow it as trust property into any traceable

(1) 18 Ch. D. 531, 543. (2) 19 Ch. D. 342, 351.

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investment: *Lewis* v. *Madocks*. (1) The husband received it with full knowledge of the trust, and his executors, who hold the bonds into which part of it has been traced, cannot rely on the Statutes of Limitation. We are not suing for damages for breach of covenant. We are calling upon the executors of a trustee to deliver up the trust property in their hands: *Coxwell* v. *Franklinski*. (2)

Hon. Frank Russell, K.C., and *H. S. Preston*, for the defendants. The 285*l*. never became trust property. The moment the wife received it it became the husband's in her right. He no doubt, as well as his wife, was under a covenant to settle it. But that did not make him a trustee. He was only in the position of a simple covenantor—*Stone* v. *Stone* (3)—and the remedy on his covenant is long since barred. The point is really covered by the second judgment in *Spickernell* v. *Hotham*. (4) In 1828 a settlor covenanted to transfer 962*l*. annuities belonging to him to the trustees of a marriage settlement to which he was a party. He died more than twenty years after (5) without having done so, and the trustees brought in a claim in the administration of his estate, contending that a trust of the annuities was created. Wood V.-C. held that no trust was created and that the action on the covenant was barred.

[SWINFEN EADY J. Did the settlor hold the annuities at the time of his death?]

That does not appear. But if the covenant had created a trust of those annuities, he would have held them as an express trustee and the statutes would not have applied. Where a man receives trust property with knowledge of the trust, lapse of time is no bar to a claim for repayment: *Spickernell* v. *Hotham* (third judgment) (6); *In re Dixon*. (7) The second judgment in *Spickernell* v. *Hotham* (4) was followed by Eve J. in *In re Plumptre's Marriage Settlement* (8), and notwithstanding the dicta in *Smith* v. *Lucas* (9) and *Collyer* v. *Isaacs* (10) it is good law.

(1) (1803) 8 Ves. 150; (1810) 17 Ves. 48, 57.
(2) (1864) 11 L. T. 153.
(3) (1869) L. R. 5 Ch. 74.
(4) Kay, 669, 675.
(5) In 1850. 2 W. R. 638.
(6) Kay, 669, 677.
(7) [1900] 2 Ch. 561, 574, 583.
(8) [1910] 1 Ch. 609, 616.
(9) 18 Ch. D. 531, 543.
(10) 19 Ch. D. 342, 351.

In *Coxwell* v. *Franklinski* (1) the trust funds were advanced to a person with knowledge of the trust. That of course fell within the third judgment in *Spickernell* v. *Hotham.* (2)

Micklem, K.C., in reply. The second covenant in *Stone* v. *Stone* (3) was a mere money covenant and did not bind any specific fund. In *In re Plumptre's Marriage Settlement* (4) Eve J. in effect held that the covenant did not create a trust in favour of volunteers. The case of persons within the marriage consideration was not before him.

Cur. adv. vult.

Oct. 30. SWINFEN EADY J. (after stating the facts). The defence of laches and acquiescence was given up by the defendants, but they insisted that, although they still retained the bonds, they were under no liability to the plaintiffs. They put their case in this way—that the plaintiff trustees could not follow the bonds into their hands, that the only liability of the husband was upon his covenant, and the claim of the trustees was for damages only, and that as this claim accrued in 1879 it was long since barred by the Statutes of Limitation.

Having regard to the authority of the wife in respect of the banking account, and to the difficulty of ascertaining now the exact extent of it (the old papers of Messrs. Parsons & Co. being no longer available), there is some doubt as to whether these bonds were in the husband's lifetime in his sole possession or under his sole control, but having regard to the allegations in the statement of claim I must deal with the case upon the footing that the bonds were in the possession of the husband at his death. He received the bonds, purchased with his wife's money, with full notice of the trusts of the settlement, and knowing that the 285*l.* and the bonds purchased with part of it were bound by the covenant, and moreover he gave no value, but is in the position of a volunteer. The trustees having traced the property into his hands are entitled to claim it from his executors.

It was contended that the bonds never in fact became trust property, as both the wife and husband were only liable in

(1) 11 L. T. 153.
(2) Kay, 669, 677.
(3) L. R. 5 Ch. 74.
(4) [1910] 1 Ch. 609, 616.

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damages for breach of covenant, and that the case was different from cases where property which has once admittedly become subject to the trusts of an instrument has been improperly dealt with, and is sought to be recovered. In my opinion as soon as the 285*l.* was paid to the wife it became in equity bound by and subject to the trusts of the settlement. The trustees could have claimed that particular sum, could have obtained at once the appointment of a receiver of it, if they could have shewn a case of jeopardy, and, if it had been invested and the investment could be traced, could have followed the money and claimed the investment.

This point was dealt with by Jessel M.R. in *Smith* v. *Lucas* (1), where he said: "What is the effect of such a covenant in equity? It has been said that the effect in equity of the covenant of the wife, as far as she is concerned, is that it does not affect her personally, but that it binds the property: that is to say, it binds the property under the doctrine of equity that that is to be considered as done which ought to be done. That is in the nature of specific performance of the contract no doubt. If, therefore, this is a covenant to settle the future-acquired property of the wife, and nothing more is done by her, the covenant will bind the property."

Again in *Collyer* v. *Isaacs* (2) Jessel M.R. said: "A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value, e.g., in his marriage settlement, to settle all such real estate as his father shall leave him by will, or purports actually to convey by the deed all such real estate, the effect is the same. It is a contract for value which will bind the property if the father leaves any property to his son."

The property being thus bound, these bonds became trust property, and can be followed by the trustees and claimed from a volunteer.

Again the trustees are entitled to come into a Court of Equity to enforce a contract to create a trust, contained in a marriage settlement, for the benefit of the wife and the issue of the

(1) 18 Ch. D. 531, 543. (2) 19 Ch. D. 342, 351.

marriage, all of whom are within the marriage consideration. The husband covenanted that he and his heirs, executors, and administrators should, as soon as circumstances would admit, convey, assign, and surrender to the trustees the real or personal property to which his wife should become beneficially entitled. The trustees are entitled to have that covenant specifically enforced by a Court of Equity. In *In re D'Angibau* (1) and in *In re Plumptre's Marriage Settlement* (2) it was held that the Court would not interfere in favour of volunteers, not within the marriage consideration, but here the plaintiffs are the contracting parties and the object of the proceeding is to benefit the wife and issue of the marriage. In *In re D'Angibau* (1) Cotton L.J. said: "As a rule the Court will not enforce a contract as distinguished from a trust at the instance of persons not parties to the contract: *Colyear* v. *Countess of Mulgrave*. (3) The Court would probably enforce a contract in a marriage settlement at the instance of the children of the marriage, but this is an exception from the general rule in favour of those who are specially the objects of the settlement."

It was contended, and the argument was much pressed, that *Spickernell* v. *Hotham* (4) established that where a settlor covenanted in a marriage settlement to transfer forthwith to the trustees of the settlement a sum of stock then belonging to him, and failed to do so, the trustees could not claim to follow the stock, if still remaining in the covenantor's control, but that their only remedy was in damages for the breach of covenant. This argument is not well founded. The only claim of the trustees in that case was to rank as specialty creditors, and, as such, their claim was barred by the Statutes of Limitation. I have referred to the Master's report and the other papers in that case, from which it appears that the settlor, G. V. Drury, died owing large sums of money; his personal estate was small, and had been exhausted, and the object of the suit was to obtain payment of his debts out of his real estate. There was no question of following the 962*l*. New 4 per cent. Annuities. At the date of the proceedings New 4 per cent. Annuities had been converted into

(1) 15 Ch. D. 228, 242.
(2) [1910] 1 Ch. 609, 616.
(3) (1836) 2 Keen, 81.
(4) Kay, 669, 675.

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New 3¼ per cent. Annuities, but there was no such stock standing in the name of the settlor or of his executors, and the claim was limited to a money demand, as specialty creditors, with a view to the payment of the amount out of the real estate.

The result is that the plaintiffs have established their claim to the two bonds or debentures in question, and the interest which has accrued thereon since the husband's death.

Solicitors: *Sharpe, Pritchard & Co., for W. C. Cripps, Son & Daish, Tunbridge Wells; Dollman & Pritchard.*

G. R. A.

WARRINGTON J.
1912
Oct. 23.

In re STURMEY MOTORS, LIMITED. RATTRAY *v.* STURMEY MOTORS, LIMITED.

[1911 S. 2329.]

Landlord and Tenant—Lease—Landlord's Property Tax—Payment by Tenant—Omission to deduct from next Payment of Rent—Right to deduct from future Payments—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *Sched.* (*A.*), *No. IV., r.* 9—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

By a lease dated in 1907, certain premises were demised to a company, and the company thereby covenanted to pay the rent and taxes in respect thereof, except land tax and landlord's property tax. The company never paid any of the rent reserved, but made certain payments in respect of landlord's property tax. In 1911 a debenture-holders' action was commenced and a receiver was appointed. Subsequently the lessor threatened to distrain for the rent in arrear, and in order to avoid distress the receiver signed an undertaking by which he undertook to pay an occupation rent, and also to pay the "arrears of rent" then owing out of a particular fund. The receiver paid one year's landlord's property tax, and subsequently made a payment of occupation rent without deducting anything for property tax:—

Held, that the joint effect of Sched. (A.), No. IV., r. 9, of the Income Tax Act, 1842, and s. 40 of the Income Tax Act, 1853, was to treat the payment by a tenant of landlord's property tax as a pro tanto payment of rent.

Held, therefore, that the receiver was entitled to deduct the payments made by the company and himself in respect of landlord's property tax from any future payments of rent to be made by him under his undertaking.

ADJOURNED SUMMONS.

By an indenture of lease dated April 23, 1907, certain land

near Widdrington Road, Coventry, together with the factory and buildings erected thereon, was demised by Miss Mary Helen Sturmey and her mortgagees unto the defendant company for a term of ninety-nine years from December 25, 1906, at a yearly rent during the first year of 166*l.*, during the second year of 204*l.*, and during the third and subsequent years of 242*l.*, and it was thereby provided that until the mortgagees should require payment of the rent to them and give the lessee notice in writing requiring such payment the rent should be paid to Miss Sturmey. The lease contained the usual covenants on the part of the lessee to pay the rent and all rates and taxes in respect of the demised premises except land tax and landlord's property tax.

Part of the premises comprised in the lease was subsequently sold by Miss Sturmey with the consent of her mortgagees, and by an indenture dated March 18, 1910, by which the sale was carried out, and to which Miss Sturmey, her mortgagees, the defendant company, and the purchasers were parties, an apportioned yearly rent of 218*l.* 8*s.* was made payable by the defendant company in respect of the property remaining subject to the lease.

In 1911 the present debenture-holders' action was commenced, and on July 21 of that year a receiver was appointed, and he had since been in occupation of the premises.

The defendant company had never paid any of the rent reserved by the lease, but had made four annual payments in respect of landlord's property tax.

Miss Sturmey threatened to distrain on the premises for the four years' arrears of rent, and in order to avoid distress the receiver on January 1, 1912, signed an undertaking in the following terms:—

"*Re* Sturmey Motors, Limited.

"In consideration of the arrears of rent owing to you in respect of the above company's occupation at Widdrington Road, Coventry, and in consideration of your not enforcing your remedies therefor by distress or re-entry I . . . . the receiver and manager of the said company appointed by order of Mr. Justice Parker hereby undertake and agree as follows:—

"1. That so long as I remain in occupation as receiver I will

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pay to you the yearly rent of 218*l.* 8*s.* reserved by the lease thereof as varied by a subsequent deed dated 18th March 1910 such rent commencing as on 21st July 1911.

"2. That I will out of the first proceeds of sale in my hands as such receiver arising from the sale of any goods machinery or effects on which you either would have been or might hereafter have become entitled to levy a distress pay to you the arrears of rent owing to you in respect of the said lease as varied as above such arrears commencing as from 25th December 1906 and continuing till the said 21st July 1911.

"3. That nothing herein contained or done hereunder shall in any way prejudice or affect your claim to an additional rent of 35*l.* in respect of the above property which claim is to be the subject of further investigation."

During his occupation of the premises the receiver had paid one year's landlord's property tax and had subsequently made a payment of rent in respect of his own occupation without deducting anything in respect of the previous payments of landlord's property tax.

This was a summons taken out by Miss Sturmey, who had obtained liberty to attend the proceedings in the action, asking that the rent originally directed to be paid to her by the receiver under the order of July 21, 1911, might extend to and include an additional rental of 35*l.* per annum payable to her, such 35*l.* rental commencing on March 25, 1907, being in arrear from that date and being in respect of the claim mentioned in paragraph 3 of the receiver's undertaking of January 1, 1912, and in addition to the rent mentioned in paragraphs 1 and 2 of such undertaking.

The case made by the applicant was that in the early part of 1907 the defendant company required additional buildings to be erected for the purpose of its business, and that it was verbally agreed between the directors of the defendant company and the applicant that she should erect such buildings at an expense of 700*l.*, in return for which the defendant company was to pay her an additional rent of 35*l.*, being 5*l.* per cent. on her outlay, that in pursuance of this agreement she erected the buildings in the early part of 1907, and that the same had since been occupied by

the defendant company, but no rent had been paid for them by the defendant company.

Warrington J. held upon the evidence that the applicant's claim to the additional rent was not made out.

His Lordship was then asked to decide the question which had arisen whether the receiver was entitled to deduct from the "arrears of rent" which by paragraph 2 of his undertaking he had agreed to pay to the applicant the payments made by the defendant company for landlord's property tax, and also whether he was entitled to deduct from the rent to be paid by him during his own occupation the payments he had made in respect of landlord's property tax.

T. J. C. Tomlin, for the applicant. The right given by the Income Tax Act, 1842, Sched. (A.), No. IV., r. 9, to a tenant to deduct landlord's property tax paid by him from the next payment of rent being a statutory right, the provisions of the statute must be strictly complied with. If therefore the tenant omits to deduct the tax from the next payment of rent he cannot deduct it from any subsequent payment of rent: *Cumming* v. *Bedborough* (1); *Spencer* v. *Parry* (2); Woodfall on Landlord and Tenant, 19th ed. pp. 655, 656. Sect. 40 of the Income Tax Act, 1853, and s. 15 of the Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), are concerned only with the variations of the rates of the tax payable.

The present case falls under two heads—(1.) the several payments of the tax by the defendant company, and (2.) the one payment of the tax by the receiver. As regards the first, it is submitted that the receiver is not entitled to deduct the amounts of the tax inasmuch as they were not paid by him but by the defendant company and omitted to be deducted from the then next payments of rent; and as regards the second he is not entitled to deduct it because having omitted to do so from the then next payment of rent his right is now lost. The applicant

(1) (1846) 15 M. & W. 438. (2) (1835) 3 Ad. & E. 331.

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is therefore entitled to the full rent reserved by the lease as modified by the deed of March 18, 1910.

John Henderson, for another party.

Clauson, K.C., and *H. E. Wright*, for the defendant company, were not called upon.

WARRINGTON J. I am asked to decide, in effect, what is "the rent" mentioned in paragraphs 1 and 2 of the undertaking. Is it the full amount of rent in arrear at the several times mentioned in the undertaking, or is it only the amount of the rent less the property tax paid by the tenant? The facts stated shortly are as follows: The company occupied the premises under a lease which contained the usual covenant by the tenant to pay the rent reserved by the lease and also to pay all rates and taxes payable in respect of the premises except land tax and landlord's property tax. The company occupied the premises but never paid any rent. When the present action was commenced and the receiver was appointed there were four years' arrears of rent due. In respect of each of those four years the company had paid the property tax. The receiver has occupied the premises since his appointment in July, 1911, and he has paid one year's property tax. He has made one payment of rent since paying the property tax. On January 1, 1912, the undertaking to which I have referred was signed by the receiver. The lessor was then entitled to distrain for four years' rent due at the date of the appointment of the receiver. The undertaking is in these terms: [His Lordship read paragraphs 1 and 2 of the undertaking, and continued:] What is the meaning of that undertaking? What are the "arrears of rent" which the receiver undertook to pay? Clearly the arrears of rent for which—but for the undertaking—the lessor would have been entitled to distrain. What are those arrears? The receiver says that all the lessor would have been entitled to distrain for was the rent less property tax. The lessor says No, since the tenant, having paid the property tax and not having deducted it from the next payment of rent, cannot deduct it at all, and she contends that she can distrain for the full rent. Is that the true meaning of the Income Tax Acts?

The Act of 1842, by Sched. (A.), No. IV., r. 9, provides as follows: "The occupier of any lands, tenements, hereditaments, or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being . . . . as a rate of sevenpence for every twenty shillings thereof would by a just proportion amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent; and . . . . all landlords . . . . shall allow such deduction upon receipt of the residue of the rent, under the penalty herein contained; and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable . . . ." Therefore the effect of that provision is that the tenant paying the tax is, under the last words I have read, to be acquitted and discharged of so much money as if it had actually been paid to the person to or for whom his rent shall have been due and payable, and the rent to that extent is discharged and no longer payable to the landlord. That is the plain effect of the rule. But the matter is made even clearer by s. 40 of the Act of 1853, which contemplates that a deduction may be made in respect of rent accruing due over a period much longer than that in respect of which the payment is made. The section omitting immaterial words is in these terms: "Every person who shall be liable to the payment of any rent . . . . whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable . . . . for every twenty shillings of such payment; and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction, upon the receipt of the residue of such money, under pain of

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forfeiting the sum of fifty pounds for any refusal so to do . . . ." It is on the payment of the rent for which he is liable, not the rent for a quarter of a year, or a year, or any other particular periods, that he is "to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable." The effect of the two provisions is that at the time when the receiver went into possession the rent payable by the tenant in respect of the premises was not so many times 242*l.* or whatever the rent of the property was, but so many times that sum less the sums for which the tenant was acquitted and discharged by payment of the property tax during the period in which the rent had been accruing—that is the period mentioned in paragraph 2 of the undertaking. Therefore, on the true construction of the undertaking, the receiver will fulfil his obligation by paying the arrears of rent owing under the lease less the total amount of the sums paid by the company for property tax. As to the rent to be paid during his own occupation the position is the same. He promises as receiver to pay the rent; but to the extent to which he pays property tax he is acquitted and discharged. He has therefore to pay the rent less the property tax which he has paid.

Solicitors: *Pothecary & Co.; Crowders, Vizard, Oldham & Co., for Browetts, Coventry.*

W. I. C.

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[1912 E. 500.]

Settlement—Tenant for Life and Remainderman—Shares in Company—Reserve Fund—Bonus Dividend—New Shares—Option—Capital or Income.

The capital of a company was divided into 10,000 shares of 10*l.* each, of which 3728 shares only had been issued and were fully paid up. The company was very prosperous and the market value of its shares was 30*l.* each. In February, 1912, the reserve fund of the company exceeded 50,000*l.*, and the directors proposed a scheme for distributing part of the reserve fund, representing accumulated undivided profits, amongst the shareholders, so that every shareholder would get a bonus of one new fully-paid 10*l.* share for every existing share held by him. Accordingly, resolutions were passed by the company (*a*) empowering the directors to declare a bonus dividend out of the reserve fund, and (*b*) sanctioning the distribution of a bonus dividend of 10*l.* per share out of the reserve fund, authorizing the further issue of 3728 shares of 10*l.* each out of the unissued capital of the company to be allotted pro rata amongst the existing shareholders, and directing that such new shares be paid up in full forthwith. The directors then sent a circular letter to every shareholder with a warrant for the bonus dividend on his shares, informing him of an allotment to him of his proportion of the new shares and giving him an option to accept or refuse the allotment, and stating that if he accepted the allotment he was to indorse and return the dividend warrant to the company to be applied in payment of the new shares. Trustees of a testator's will held 200 shares of the company and, on receipt of the circular letter, accepted their allotment of 200 new shares, indorsed and returned their bonus dividend warrant for 2000*l.*, and afterwards sold the new shares at a profit. The question then arose whether, as between the tenants for life and remainderman under the will, the bonus dividend was capital or income:—

Held, on the evidence, that the company intended to capitalize the reserve fund and not to distribute it as a bonus dividend, and therefore that the whole of the bonus dividend was capital of the testator's estate.

The principle of *Bouch* v. *Sproule* (1887) 12 App. Cas. 385, applied.

Adjourned Summons.

The testator, Evan Evans, by his will made in 1903, after appointing certain persons to be the executors and trustees thereof, gave his residuary real and personal estate to his trustees upon usual trusts for sale and conversion and investment, and directed his trustees to stand possessed of his net

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residuary estate and the investments for the time being representing the same (thereinafter called the residuary trust funds) upon trust for his wife and his daughter (a married woman) for life, and after the death of his wife and daughter upon trusts for the children of his daughter as therein mentioned. And the testator empowered his trustees to postpone the sale and conversion of any part of his real and personal estate for so long as they might think fit, and at their discretion to retain unconverted any of the investments of which he might be possessed at the time of his decease although such investments might not be of such a kind as trustees were allowed by law to invest in.

The testator died in 1904, and his will with a codicil (not material) was duly proved by the acting executors. The testator's wife and daughter survived him. The daughter had an only child who had attained twenty-one.

Part of the testator's estate at his death consisted of 200 fully paid up shares of 10*l.* each in the Ely Brewery Company, Limited, of Cardiff, which was a prosperous company paying large dividends, and the trustees under the powers in the will retained these shares unconverted. The shares stood above par in the market.

The company was incorporated in the year 1887, and article 117 (*l*) of its articles of association provided:—

"The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, and for such other purposes as the directors shall, in their absolute discretion, think conducive to the interests of the company, and they may invest the several sums so set aside upon such investments as they may think fit, and may from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and they may divide the reserve fund into such special funds as they think fit."

The nominal capital of the company was, originally, 30,000*l.* divided into 3000 shares of 10*l.* each, which was afterwards under a power in the articles increased to 100,000*l.* divided into

10,000 shares of 10*l.* each, all ranking equally. The balance-sheet of the company for the year ending March 31, 1911, shewed that of the nominal capital of the company only 3728 shares had been issued and were fully paid up, and that its reserve fund was 52,500*l.*, which was represented on the assets side of the account to a large extent by the value of its freehold and leasehold houses.

On February 5, 1912, the directors of the company sent the following report to all the shareholders, including the testator's trustees:—

"Your directors feel that the time is now come when they may safely recommend some permanent appropriation of a portion of the reserve fund, a considerable amount of which is undivided profits. They therefore propose a scheme for apportioning some of the reserve fund which will result in each shareholder receiving as a bonus one new share of 10*l.* fully paid for every existing share held by him, i.e., a shareholder now holding two shares will then hold four shares, if three shares he will then hold six shares, and so on, each shareholder having his present holding doubled. This will still leave a balance of 17,926*l.* in the reserve fund and profit and loss account.

"The capital of the company will then be 7456 fully-paid 10*l.* shares. By carrying out this arrangement the directors feel that the shares will be more negotiable in the market, and will tend to induce new customers to become shareholders, thereby increasing the business of the company.

"It is proposed to make the allotment to every shareholder whose name is on the register on the 1st March, 1912. The new shares will rank for dividend along with the old ones from the 30th September, 1911.

"A slight alteration in the articles of association will be necessary for the above purpose: the attached notice refers to same."

The attached notice was a notice convening an extraordinary general meeting of the company to be held on February 14, 1912, for the purpose of passing the following resolution:—

"That there shall be added to the articles after clause 117 the following clause 117a: 'The directors may from time to time with the sanction of the company in general meeting declare a

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bonus or special dividend to be paid to the members in proportion to their shares out of the reserve fund or out of any other accumulated profits for the time being of the company.'

"Should the resolution be passed by the required majority it will be submitted for confirmation as a special resolution to a second extraordinary meeting which will be subsequently convened."

This special resolution was duly passed, and on February 26, 1912, the directors gave notice to the shareholders (including the testator's trustees) convening an extraordinary general meeting of the company to be held on March 6, 1912, for the purpose of confirming the special resolution; and the notice went on to convene an ordinary general meeting of the company to be held on the same day and at the same place, immediately after the extraordinary general meeting, for the purpose of sanctioning the declaration of a dividend, and stated:—

"The following resolutions will be proposed:—

"(1.) That this meeting sanctions the distribution of a bonus dividend of 10*l.* per share to be paid free of income tax out of the company's reserve fund and undivided profit now in hand.

"(2.) That the directors be authorised to issue further shares of the company to the amount of 3728*l.* divided into shares of 10*l.* each out of the unissued capital of the company such new shares to rank pari passu with the existing shares.

"(3.) That the directors be authorised to allot such new shares pro rata among the existing members of the company according to the number of shares for which they may be registered on the 28th of February, 1912, in the proportion of one new share for every existing share.

"(4.) That the shares so allotted shall be allotted on the terms that they be paid up in full forthwith."

On March 8, 1912, the trustees received from the secretary of the company a printed letter, enclosing a dividend warrant and two forms. The letter (omitting formal parts) was as follows:—

"I am instructed to inform you that in accordance with the special resolution passed at a general meeting of the company held on the 14th day of February, 1912, and confirmed at a further meeting held on the 6th day of March, 1912, and the

ordinary resolutions passed at the latter meeting, the directors have, in respect of the shares now registered in your name in the company's books, allotted to you 200 new shares of 10*l.* each, subject to the amount due upon them being paid up in full on or before the 20th day of March instant.

"I also enclose you a bonus dividend warrant payable upon that date for 2000*l.* free of income tax. If you desire to take up the allotment of the above new shares by means of such dividend warrant, will you be good enough to sign the enclosed dividend warrant and return it to me along with form numbered '1' not later than the 20th instant, when the amount will be applied in payment of these new shares.

"If you do not desire to take up the new shares allotted to you kindly sign and return the enclosed form numbered '2.'

"In the absence of any communication from you on or before the 20th day of March instant, the directors reserve to themselves the right to treat your silence as an election on your part *not* to accept the allotment and the directors may act as if you had declined the allotment.

"If you elect to take the shares do not cash the dividend warrant but please endorse and return it with form numbered '1' to the secretary at the brewery in the enclosed envelope when a new certificate for the number of shares allotted to you will be prepared and forwarded to you in due course.

"By way of further explanation the directors desire to state that the 10*l.* shares are of much greater value than 10*l.* on the market to-day, and they trust the shareholders will take advantage of the benefit now offered by taking the bonus in shares instead of cash as the shares cannot be had for 10*l.* in any other way."

The trustees decided, without prejudice to the rights of their beneficiaries, to accept the allotment of the 200 new shares. They accordingly indorsed and returned the dividend warrant to the secretary of the company together with form "1" filled up and signed by them as follows:—

"We hereby accept the 200 new shares which have been allotted to us subject to the conditions on which they are issued, and request that the whole be registered in our names as trustees

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of the estate of Evan Evans deceased. We return the bonus dividend warrant duly signed by us to be applied in payment of the shares."

Form No. 2 was as follows: "I do not desire to take up the new shares which you have allotted to me."

In due course the trustees received from the company a certificate for the 200 new shares fully paid. The trustees then issued a summons for the determination of the question whether the 200 new shares which had been paid up by means of the bonus dividend were, as between the tenants for life and the remainderman, to be treated either wholly or in part as income or capital.

Immediately before the issue of the new shares the market value of the old shares was 30*l.* per share, and after the issue of the new shares the market value of the shares of the company fell to 15*l.* per share; and the trustees, after the issue of their summons, sold their 200 new shares for 15*l.* per share.

J. M. Gover, for the trustees.

Galbraith, for the tenants for life. It is submitted that the tenants for life are entitled to the proceeds of sale of the new shares, to the extent of the bonus dividend, as income. *Bouch* v. *Sproule* (1) will be cited against me, but it is distinguishable. Payments out of accumulated profits of past years are not necessarily capital; the question whether they have been converted into capital or not is one of fact upon the circumstances of each case: Buckley on Companies, 9th ed. pp. 649, 650. In *Bouch* v. *Sproule* (2) the House of Lords agreed with the principle laid down by the Appeal Court (3) as applicable to these cases, but reversed their decision on the question of fact. In that case the company intended to capitalize their profits and the shareholders virtually had no option but to come in and accept the allotment of new shares. Here the shareholders had the option either to accept the allotment or to retain the dividend warrant, and that distinguishes this case from *Bouch* v. *Sproule*. (1) The principle

(1) 12 App. Cas. 385. (2) 12 App. Cas. 395.
(3) (1885) 29 Ch. D. 635, 653.

of *In re Malam* (1) really governs this case, and *In re Northage* (2) is very like it. *In re Hume-Nisbet's Settlement* (3) and *In re Despard* (4) are also in my favour.

Rolt, for the remainderman. *Bouch* v. *Sproule* (5) governs this case, and so far as subsequent cases are inconsistent with it they should not be followed. The test is whether the company intended to distribute the reserve fund as dividend or to convert it into capital. The reserve fund is on the capital side of the accounts and balance-sheet as a liability. If it is intended to pay it away as dividend, there will be a reduction on each side of the accounts. If it is to be capitalized, there is then only a transfer from the reserve fund to the issued share capital. The facts of the present case are very similar to those in *Bouch* v. *Sproule* (5), and I rely on the report of the directors and the resolutions of the company as shewing that they intended the dividend bonus should not be paid in cash but should be turned into capital. They had not the cash in hand to pay it, and even if an option was given here to take the bonus in cash, that does not affect the principle of the decision in *Bouch* v. *Sproule*. (5)

[He was stopped.]

NEVILLE J. The point to be determined in this case is whether a certain dividend declared by the directors of the company, under circumstances to which I will refer, is to be treated as capital or as income of the testator's estate. The transaction was originally arranged by the directors of the company, and the proposal that they put before the shareholders is made perfectly plain by the circular which they addressed to them. The company was prosperous. It had a reserve fund accumulated out of undivided profits, and its shares stood at a considerable premium. The directors thought that it would be for the benefit of the company if the reserve fund, which in its full amount was not required for the purposes of the company, should be converted into share capital. There were unissued shares of the company which could be utilized for that purpose; and the proposal was

(1) [1894] 3 Ch. 578.
(2) (1891) 60 L. J. (Ch.) 488.
(3) (1911) 27 Times L. R. 461.
(4) (1901) 17 Times L. R. 478.
(5) 12 App. Cas. 385.

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in fact to double the issued share capital by giving to every shareholder for every 10*l.* share that he held another 10*l.* share to be treated as fully paid up by the application of an equivalent dividend which was to be declared out of the undivided profits in the reserve fund. Undoubtedly the reserve fund represented assets of the company which enhanced the value of the share capital; and the directors might, at all events with the sanction of the company, at any time or from time to time have distributed the reserve fund, the accumulated undivided profits, by way of dividend. From the necessity of the case it has always been held that, as between tenant for life and remainderman, the Court must decide whether a particular fund is to be treated as capital or whether it is to be treated as income by way of dividend; and one does not see very well how any other rule could apply. In ordinary cases there is no difficulty about it. If the directors had applied the reserve fund for the purpose of equalizing dividends, or for the purpose of paying dividends where none were earned in the particular year, I do not think it could be successfully argued that such payments were not payments for the benefit of the tenant for life. In such a case there is little or no difficulty. But when you come to a transaction like the present you have to go more closely into the matter in order to ascertain in what way the bonus dividend ought to be treated. Now prior to the date of the transaction in question the value of each share in the company was augmented by the existence of the reserve fund, which, upon the distribution of the assets of the company amongst the shareholders, would increase the amount which each shareholder would get. The result of transferring the undivided profits standing to the credit of the reserve fund to the credit of newly issued capital of the same amount would theoretically be to halve the value of each share: that is to say, taking imaginary figures, if you have 1000 shares of 10*l.* each representing assets, including among the assets the accumulated profits which had been invested, and you thereupon issue another 1000 shares of 10*l.* each, transferring the amount standing to the credit of the reserve fund to the credit of the face value of the new shares, you would then get, as a matter of account, a sum representing capital

instead of a sum representing the reserve fund; and it is obvious you would have increased the capital of the company, but you would not have increased the assets of the company by a penny. Consequently, that which had to be divided previously between 1000 shares would now have to be divided amongst 2000 shares. Therefore the two shares would receive exactly the same amount on distribution as the one share received previously. That, of course, is a theoretical way of looking at it. Experience, I think, shews that in a prosperous concern of this kind the shares are not reduced very substantially in value by this alteration. There are plenty of persons willing to come into a concern of this kind, and to pay a premium for the new shares, notwithstanding the fact that the share capital has been doubled, the assets remaining the same. In this case the directors thought it was desirable that the doubling of the share capital should take place, and they submitted that proposition to the shareholders, and the shareholders adopted it, and passed what were considered to be the necessary resolutions to carry it into effect. Consequently we must take it that the intention of the company was, as far as they could give effect to it, that the accumulated profits in the reserve fund should be applied towards the issue of new fully-paid shares to be distributed, according to their holding, amongst the shareholders.

Now comes the real difficulty, not only in this case, but in all the cases that have been cited. In the absence of some special provision in the constitution of the company, there is no means that I know of by which legal effect can be given to that intention against the wish of any individual shareholder in the company. The directors are bound to declare dividends equally amongst all the shareholders, and not to prefer one shareholder to another. They could not say "If you do not choose to give back the dividend which we declare in payment of new fully-paid shares you shall not have it at all": that would not do. Therefore they have to carry out their scheme by offering such inducements to the shareholders to fall in with it, and to apply the dividend in payment of the amount due on the new shares, as to make such application practically inevitable. Consequently, the election as to whether the particular dividend is to be

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capitalized or whether it is to be income does in fact remain with the shareholder, and is not subject to the control of the company, the company having to rely on what is practically a certainty in almost every case that the shareholder will take the greater advantages offered rather than the comparatively small amount of cash which would be payable to him. As I understand it, the same circumstances existed in *Bouch* v. *Sproule*. (1) The House of Lords had to consider what, under those circumstances, was the effect, as between tenant for life and remainderman; and they held (and I am bound by their decision) that the question was, What was the nature of the scheme? Was the scheme intended by the company to result in the transfer of the amount or part of the amount standing to the credit of the reserve fund to the payment of new capital to be distributed amongst shareholders, or was it merely an ordinary distribution of dividends out of the reserve fund, leaving it a matter of pure choice, with regard to which the company expressed no desire at all, as to how it should be applied? In *Bouch* v. *Sproule* (1) the House of Lords, to my mind, are perfectly clear in saying that you must see what it was the company intended. In my opinion in all these cases it is a question of fact, and the decision must turn on what was the intention of the company. In the present case the company intended to convert a portion of their reserve fund into new capital to be distributed amongst the shareholders. They could not do it authoritatively, but they did it successfully by offering such inducements as made all the shareholders come in. That being so, I think it is impossible for me to distinguish the present case from *Bouch* v. *Sproule* (1), and therefore I am glad to think that the conclusion I should have come to, if authority had not existed which I was bound to follow, is the same as that which I find in that case.

Undoubtedly there are cases which create a certain difficulty in considering a point of this kind, because it has been said that where there is an option to the shareholder, either to take the dividend or to return it to the company as payment in respect of the new shares, there it is to be treated as dividend and not as

(1) 12 App. Cas. 385.

capital. All these cases depend upon questions of fact, and I am not in the least concerned to criticize any of the cases that have been cited to me. Whether I should have come to the same conclusion I do not say, but it is enough for me to say that, applying the principle of *Bouch* v. *Sproule* (1) to the present case, I cannot distinguish the one from the other. I may add that, in my opinion, the fact that the option in every reported case depended upon the shareholder and not upon the will of the company is a point which was present in *Bouch* v. *Sproule* (1), just as it was present in the other cases. *Bouch* v. *Sproule* (1), to my mind, is a clear authority that that is not material so long as the company desire and intend, by the best means available, to make it a transfer to new capital and not a distribution to be spent by the shareholders.

I wish to add this: when I say that the option vested in each shareholder, either to take the dividend and keep it, or to return it and get the greater benefit which the company offered if he did, I do not think that is true in the case of trustees; because it seems to me that, if trustees purported to exercise their election by taking 10*l.* in cash, when they were offered by the company a share worth 20*l.* if they would return it, (I am putting, of course, imaginary figures) it would be a wilful default on their part if they refused and took less, and consequently their cestuis que trust would be entitled to insist upon the trustees taking the greatest benefit which the company offered. Therefore, in the case of trustees, it seems to me that, although as between the company and them there may be a right to elect, between them and their cestuis que trust there is no such right, and they must take the dividend in what I will call the capitalized form. I hold, therefore, that in the present case the whole of the dividend must be treated as capital of the company.

Solicitors for all parties: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & Jenkins, Pontypridd.*

(1) 12 App. Cas. 385.

H. L. F.

Followed. Re SHAW'S AND *Re* WISELY'S SETTLEMENT TRUSTS. [1951] 1 All E.R. 656.

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Oct. 18.

In re HODGSON.

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[1912 H. 1682.]

Settlement—Protected Life Interest—Power of Appointment amongst Children—Advancement Clause—Appointed Shares—Whether Advances to Appointees valid—Release of Life Interest in Advances—Whether Life Interest forfeited.

By a marriage settlement made in 1865 the income of the wife's fortune was settled upon trust as to part thereof for the wife for life and as to the other part thereof for the husband for life or until bankruptcy or alienation or his doing some act whereby the same or some part thereof would become vested in or payable to some other person. Subject to the trusts aforesaid the husband's and wife's fortunes were settled upon trust (in the events which happened) for their children in such shares "and with such provisions for their respective maintenance, education, and advancement" as the husband and wife should by deed jointly appoint, and in default of such appointment for the children equally at twenty-one or marriage. Then followed the usual advancement clause.

In 1896 the husband and wife by deed appointed one equal ninth share of the trust funds to a son on his marriage and the appointed share was settled, and in 1897 they by deed appointed another equal ninth share to another son on his marriage and the appointed share was settled. Neither of these appointments contained an advancement clause. Subsequently the trustees of the 1865 settlement in exercise of their power of advancement raised 4000*l.* out of their trust funds in respect of each appointed share and paid the same to each of the sons' marriage settlement trustees, and the husband and wife released their respective life interests in each of the sums so advanced:—

Held, that the appointments must be read into the original settlement and that the advancement clause applied to appointed as well as to unappointed shares.

M'Mahon v. *Gaussen* [1896] 1 I. R. 143, approved and followed.

Held, also, that the husband by releasing his life interest in the sums advanced did not thereby forfeit his life interest under the settlement.

ADJOURNED SUMMONS.

In 1865, on the marriage of a Mr. and Mrs. Hodgson, property of the husband and of the wife was brought into settlement. The husband's property was settled upon trust for the wife for life for her separate use without power of anticipation, and after

her death upon the trusts thereinafter declared. The wife's fortune was settled upon trust out of the annual income thereof to pay 150*l.* per annum to her for life for her separate use without power of anticipation, and to pay the residue of the same annual income during her life and after her death the whole of such annual income to the husband for life or until he should become bankrupt or should assign, charge, or incumber or attempt to assign, charge, or incumber the same, or should do or suffer anything whereby the same or some part thereof would through his act or default or by operation or process of law or otherwise if belonging absolutely to him become vested in or payable to some other person, and after the determination of the trusts thereinbefore declared in favour of the husband in case the wife should survive him to pay the whole of the said income to the wife for life for her separate use without power of anticipation. And from and after the determination of the trusts thereinbefore declared in favour of the husband and wife the trustees were to stand possessed of the husband's fortune and the wife's fortune (thereinafter called the trust funds) and the income thereof upon trust for the issue of the marriage in such shares and "with such provisions for their respective maintenance education or advancement at the discretion of the said trustees or trustee" as the husband and wife should by deed jointly appoint and in default of such appointment as the survivor should by deed or by will or codicil appoint, and in default of such appointment upon trust for the children of the marriage at twenty-one or marriage. And it was thereby declared that it should be lawful for the trustees or trustee after the death of the husband and wife or in their, his, or her lifetime with their, his, or her consent in writing to raise any part or parts not exceeding altogether one half of the then expectant or presumptive or vested share of any child of the marriage under the trusts thereinbefore declared and to pay or apply the same for his or her advancement or benefit as the trustees or trustee should think fit, and the settlement contained a covenant to settle the after-acquired property of the wife.

Mr. and Mrs. Hodgson had nine children, all of whom attained twenty-one.

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The property brought into settlement by Mr. and Mrs. Hodgson amounted eventually to about 81,000*l.*, of which about 71,000*l.* represented the wife's fortune, and the balance represented the husband's fortune.

By a deed poll dated July 27, 1896, Mr. and Mrs. Hodgson appointed one equal ninth part or share of the trust funds to their son Eustace Hodgson absolutely on the occasion of his marriage, and his ninth share was then settled. This deed of appointment did not contain an advancement clause.

By another deed poll dated October 27, 1897, Mr. and Mrs. Hodgson appointed another equal ninth part or share of the same trust funds to their son Gerald Hodgson on the occasion of his marriage, and his ninth share was then settled. This deed of appointment also did not contain an advancement clause.

By another deed poll dated January 10, 1898, Mr. and Mrs. Hodgson on the marriage of their daughter Mabel Hodgson appointed that the trustees of the settlement of 1865 should on the death of the survivor of them, Mr. Hodgson and his wife, raise out of the remaining unappointed seven equal nine parts or shares of and in the same trust funds and pay the sum of 8000*l.* (equivalent to a ninth share) to their said daughter, and this sum was settled. This appointment provided that the power of advancement contained in the settlement of 1865 should extend and apply to the sum thereby appointed.

On April 15, 1898, the trustees of the 1865 settlement at the written request of Mr. and Mrs. Hodgson and in the purported exercise of their power of advancement in that settlement contained raised and paid the sum of 4000*l.* out of the trust funds to the trustees of Mabel Hodgson's marriage settlement; and on April 12, 1901, they at the like request of Mr. and Mrs. Hodgson and in purported exercise of their power of advancement raised and paid the sum of 4000*l.* out of their trust funds to the trustees of the marriage settlement of Eustace Hodgson.

By another deed poll dated May 6, 1901, Mr. and Mrs. Hodgson, after reciting that the said two sums of 4000*l.* had under the power of advancement contained in the 1865 settlement been raised out of the trust funds and paid to the trustees of the marriage settlements of Eustace Hodgson and Mabel

Hodgson, "and that with a view to the immediate composition and payment of the succession duties on the said two sums of 4000*l.* so raised and paid as aforesaid Mr. Hodgson and his said wife were desirous of executing such release of their respective life interests under the settlement of 1865 on the said two sums of 4000*l.* as thereinafter appeared," it was witnessed that for effectuating the said desire and in consideration of the premises Mr. Hodgson and his said wife thereby respectively released and surrendered their respective life interests and all other their respective estates and interests in the said two sums of 4000*l.* which had been so raised and paid as aforesaid to the intent that the same sums and every part thereof respectively might be absolutely freed and discharged from such life and other estates and interests.

By another deed poll dated March 19, 1902, Mr. and Mrs. Hodgson, after reciting that by the direction of Mr. Hodgson and his wife the sum of 4000*l.* had then been raised out of the trust funds subject to the settlement of 1865 and paid to the trustees of Gerald's marriage settlement on account of the one ninth part or share that had been appointed to him, and that Mr. Hodgson and his wife had determined to execute such release of their respective life interests under the settlement of 1865 in the said sum of 4000*l.* as thereinafter appeared, it was witnessed that Mr. and Mrs. Hodgson released their respective life estates in the same sum of 4000*l.* in terms similar to those contained in the deed poll of May 6, 1901, and for the benefit of the persons entitled under Gerald's marriage settlement.

This last-mentioned 4000*l.* was raised and paid on or about March 19, 1902, in exactly the same manner and with the same intention and object as the other two sums of 4000*l.* previously raised and paid as above stated, but a previous or contemporaneous request in writing by Mr. and Mrs. Hodgson, as in the other two cases, could not be produced, and the plaintiff Weston, who was the acting trustee at the time, was unable to say definitely whether there was or was not any such previous or contemporaneous request in writing, but he deposed that, whether there was or was not any written request or consent, he was confident that he was consulted in the matter by Mr. and Mrs. Hodgson either

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personally or through his brother George Weston, who then acted as solicitor to the trustees of the settlement of 1865 and also as solicitor to Mr. and Mrs. Hodgson.

By another deed poll dated June 20, 1910, Mr. and Mrs. Hodgson in exercise of the power given to them by the settlement of 1865 irrevocably appointed, subject to their life interests therein, the sum of 4000*l.* part of the said trust funds to their son Victor Hodgson; and on the same day the trustees of the settlement of 1865, at the written request of Mr. and Mrs. Hodgson, raised and paid the sum of 4000*l.* to Victor Hodgson as an advancement on account of his share and interest in the trust funds of the settlement of 1865.

In December, 1910, Mrs. Hodgson died, and subsequently the present trustees of the settlement of 1865, in consequence of doubts that were raised, issued a summons for the determination (amongst others) of the following questions: (*a*) whether the several advances had been properly made, and (*b*) whether Mr. Hodgson had forfeited his life interest.

Jenkins, K.C., and *Vaisey*, for the plaintiffs.

Butcher, K.C., and *Harman*, for the trustees of the marriage settlements of the three married children and for some of the other children. It is submitted that the advancement clause in the settlement of 1865 does not apply to the appointed shares. In Davidson's Conveyancing, 3rd ed. vol. iii. pt. i. p. 159, the learned author says: "It is considered that the provisions for maintenance and education, and for advancement, usually inserted in settlements, would not in general apply to an appointed share, such a share being by the appointment, and so far as it extends, withdrawn from the general operation of the settlement," and he adds in a footnote that this "is the better opinion, and generally held by conveyancers," but that a contrary view appears to have been acted on in *White* v. *Grane*. (1) That case, however, is distinguishable. The point is referred to in Key and Elphinstone's Conveyancing, 4th ed. vol. ii. pp. 483, 798, and a form is given to meet the difficulty. In an Irish case of *M'Mahon* v. *Gaussen* (2) it was held that an

(1) (1854) 18 Beav. 571; cf. Farwell on Powers, 2nd ed. pp. 288, 289.
(2) [1896] 1 I. R. 143.

advancement clause applied to an appointed share, but this Court is not bound to follow that decision if it is wrong. In the next place, assuming that the advancement clause applies to appointed shares, the advances were not properly made. The terms of a power must be strictly complied with. Here the trustees were to exercise their discretion at the request of the parents. The request only brought into operation the power of the trustees. There is no evidence that the trustees exercised any discretion at all, and, taking Gerald's share as a test case and the one most favourable for us, there is no evidence of any contemporaneous written request. Subsequent ratification will not do: *Bateman* v. *Davis* (1); *Greenham* v. *Gibbeson.* (2) Lastly, the releases of May 6, 1901, and March 19, 1902, determined Mr. Hodgson's life interest in the trust funds, so that all the shares have absolutely vested.

J. G. Wood, for two of the sons, took no part in the arguments.

Peterson, K.C., and *Dighton Pollock,* for Mr. Hodgson, the tenant for life, were not called upon.

NEVILLE J. The point raised in this case is a peculiar one. Under a marriage settlement the husband takes a protected life interest in the wife's settled funds subject to the payment of 150*l.* a year to the wife, and a clause giving over his share of the income in case he incumbers or charges it is of the widest possible description and is prima facie wide enough to cover what has been done in the present case, because by an act of his he has enabled income which otherwise would have been payable to him to become payable to somebody else. The settlement also contains a power of advancement, and it provides in the power of advancement that half of the share of any child may be advanced by the trustees with the consent of the husband and the wife. It is said to be doubtful whether that advancement clause applies to an appointed share. I should like to say that my opinion is in entire concurrence with that of the Vice-Chancellor of Ireland in the case of *M'Mahon* v.

(1) (1818) 3 Madd. 98. (2) (1834) 10 Bing. 363.

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Gaussen. (1) I certainly think, speaking generally, that the exercise of a power of appointment would not operate to take the appointed share out of the provisions of the original settlement so as to defeat the advancement clause that that settlement contains. I think, therefore, that in the present case the advancement clause applied to the appointed as well as to the unappointed shares.

Now in order to understand what the settlement meant the whole document must be read together, and must be read intelligently, and one must consider what are the objects sought to be attained by the words that have been used. To suppose that by giving effect to the power of advancement the husband committed a forfeiture under the previous forfeiture clause would to my mind be perfectly absurd, and would be failing to give an intelligent construction to the whole of the settlement. I think it should be read as though there had been inserted at the end of the forfeiture clause "But this provision is not to affect any steps taken by the husband to enable the advances by the trustees hereinafter provided for to take effect." I think it is clear in the present case that nothing has been done which is not in accordance with the terms of the advancement clause, and I am bound to assume that the trustees properly exercised their discretion in making the advances. I see no reason to doubt it, although they may have been requested by the husband and wife to do so. They knew they had to exercise their discretion, and I presume they did so exercise it, and none the less because after this lapse of time they find it impossible to remember exactly what did occur at the time. I think the presumption is entirely in their favour that they acted properly in fulfilling the powers and duties of their office.

Then again, I think that the shares of the children referred to in the advancement clause would include an appointed share as well as an unappointed share of the trust funds. In the present case, there never was advanced more than half of what on the true construction of the advancement clause was the share of the child who was to be advanced, and I may add that, even supposing there had been some inaccuracy in the carrying out of the

(1) [1896] 1 I. R. 143.

powers given by the advancement clause, so long as the husband did no more than dispose in the interests of his children of the income which but for the advancement he would have received under the provisions of the settlement, any act of that kind on his part is excluded from the operation of the forfeiture clause. The forfeiture clause was never intended to operate in that direction at all, and it would be, I think, directly contrary to the whole intention of the deed if I held that it was so. I hold, therefore, that there has been no forfeiture.

Solicitors: *Harold R. Wilson; E. Lydekker.*

H. L. F.

In re WISE'S SETTLEMENT. SMITH *v.* WALLER.

[1912 W. 1006.]

Settlement — Construction — Settled Estate — Portions — Vesting — Younger Children—"Eldest or only son"—Younger Son becoming Eldest after vesting of Portion—Right to share in Portions Fund.

By a marriage settlement made in 1828 real estate was limited to trustees upon trust to raise portions for the younger children of the marriage, such portions to vest at twenty-one in the case of sons, or, in the case of daughters, at twenty-one or marriage under that age. The settlement further provided that if any of the children for whom portions were intended, being a son or sons, should die under twenty-one, "or should, before attaining such age, become an eldest or only son," then the share in the portions fund of the child so dying, or of the son so becoming an eldest or only son, was to go to the survivors or survivor who should live to attain a vested interest therein. G. W., a younger son of the marriage, in whom a share in the portions fund became vested by his attaining twenty-one in his father's lifetime, subsequently became the eldest son by the death of his elder brother in the lifetime of his father:—

Held that, according to the true construction of the settlement, G. W. was a younger son for the purpose of participating in the portions fund, the position of the son in the family having to be determined at the moment when his share vested.

Windham v. *Graham* (1826) 1 Russ. 331, followed.

In re Bayley's Settlement (1870) L. R. 9 Eq. 491; (1871) 6 Ch. 590, considered.

ADJOURNED SUMMONS.

By an indenture of settlement dated June 19, 1828, and made

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on the marriage of Henry Christopher Wise with Harriett Skipwith, certain hereditaments in the counties of Warwick and Middlesex were conveyed to the use of trustees for the term of 1000 years and subject thereto, in the events which happened, to the use of Henry Christopher Wise for life, with remainder to the use of the first and other sons of Henry Christopher Wise and Harriett Skipwith in tail male, with remainders over; and it was thereby declared that the said hereditaments were limited to the trustees of the term of 1000 years, upon trust that in case there should be lawful issue of Henry Christopher Wise by Harriett Skipwith an eldest or only son and only one other child, or an only daughter and no son, to raise the sum of 6000*l.* for the portion of such child not being an eldest or only son, and pay the same to such child at such time or times and subject to such restrictions as Henry Christopher Wise should by deed or will direct or appoint, and in default of and subject to any such appointment, upon trust to raise and pay the same to such child if a son at his age of twenty-one years, or, if a daughter, at her age of twenty-one years or day of marriage with such consent as therein mentioned, whichever event should first happen, unless happening in the lifetime of Henry Christopher Wise, and in that case it should be a vested interest in such child at such age and time aforesaid, and should be paid to such child immediately after the decease of Henry Christopher Wise; and in case there should be lawful issue of Henry Christopher Wise by Harriett Skipwith an eldest or only son and two or more other children, or two or more daughters and no son, upon trust to raise the sum of 10,000*l.* for the portions of such two children other than and except an eldest or only son; and in case there should be lawful issue of Henry Christopher Wise by Harriett Skipwith an eldest or only son and three or more other sons, or three or more daughters and no son, upon trust to raise the sum of 12,000*l.* for the portions of such three or more children (other than and except an eldest or only son) and to pay the said sum of 10,000*l.* or 12,000*l.* (as the case might be) unto the said two, three, or more children (other than and except an eldest or only son) at such time or times and in such shares and proportions and subject to such restrictions as Henry Christopher Wise should from

time to time by deed or will appoint, and in default of and subject to any such appointment, upon trust to raise and pay the said sum of 10,000*l.* or 12,000*l.* (as the case might be) to the said two, three, or more children (other than as aforesaid) in equal shares, the share or shares of such of them as should be a son or sons to be paid to him or them at his or their age or respective ages of twenty-one years, and the share or shares of such of them as should be a daughter or daughters to be paid to her or them at their age or respective ages of twenty-one years, or day or respective days of marriage with such consent as aforesaid, whichever should first happen, unless such age or time should happen in the lifetime of Henry Christopher Wise, and in that case it should be a vested interest at such age or time as aforesaid, and should be paid to him or her immediately after the decease of Henry Christopher Wise; and it was in the said indenture provided that none of the younger sons and none of the daughters of the said marriage who should take any share in the said sum of 10,000*l.* or 12,000*l.* (as the case might be) by virtue of any appointment in his or her favour should take any share in the unappointed and ineffectually appointed parts thereof until each of the others of the same children should have received thereout an equal share thereof; and it was thereby further declared that if any of the children of the said marriage and for whom portions were so intended as aforesaid, being a daughter or daughters, should die under the age of twenty-one years and without having been married with such consent as aforesaid, or, being a son or sons, die under the age of twenty-one years, or before attaining such age should become an eldest or only son, and by virtue of the limitations thereinbefore contained should be in the actual possession and entitled to the rents and profits of the said hereditaments, then and in such case the share in the said sum of 10,000*l.* or 12,000*l.* (as the case might be) of every daughter so dying, and of every son so dying or becoming an eldest or only son and so entitled as aforesaid, should go to the survivor or survivors of the same children and the executors, administrators, and assigns of such of them as might be dead, who being a son or sons should have lived to attain the age of

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twenty-one years (and should not have become an eldest or only son and so entitled as aforesaid), or, being a daughter or daughters, should have lived to attain that age or have been married. And the deed contained an ultimate declaration that if all such of the children entitled to portions as were daughters should die under twenty-one and without having been married, and all such of them as were sons should die under that age or, before attaining the same, should have become an only son and entitled in possession to the estates, then the portions should not be raised, but should sink into the freehold and other hereditaments thereby charged therewith.

Harriett Wise died in 1858.

There were eight children of this marriage. Five of them attained twenty-one in the lifetime of their father, but three of these died intestate and unmarried in his lifetime. The eldest son was Henry Christopher Wise (the younger), and George Wise was the second son. Henry Christopher Wise (the younger) attained twenty-one on April 21, 1850, and died on December 21, 1854, without having been married. George Wise attained twenty-one on May 29, 1851, and on the death of his elder brother became entitled to the settled estates as tenant in tail male in remainder, subject to the prior interests. By his will, dated August 20, 1880, Henry Christopher Wise, purporting to act in exercise of the power vested in him under the settlement of June 19, 1828, appointed the sum of 6000*l.* to be divided between his two surviving children, namely, George Wise and Augustus Wise, in the portions therein stated; and after bequeathing the residue of his personal estate, and also his real estate subject to a term of 1000 years, to George Wise, the testator appointed George Wise and Brabazon Campbell executors of his will.

Henry Christopher Wise died on January 15, 1883, whereupon the estate in tail male of George Wise became an estate in possession. The term of 1000 years was surrendered by the surviving trustee thereof to George Wise, in consideration of 12,000*l.* George Wise then disentailed the settled hereditaments and subsequently mortgaged them to Brabazon Campbell to secure 9950*l.* By his will, dated June 18, 1886, George Wise

devised to George Waller his freehold, copyhold, and leasehold hereditaments in the counties of Warwick and Middlesex and appointed the plaintiff Samuel Clark Smith and another to be the executors of his will, and gave the residue of his real and personal estate to the defendant George Stonor absolutely.

George Wise died on January 4, 1888. George Waller died on February 9, 1892, having by his will devised his real estate to his son, the defendant Sir Francis Ernest Waller, in tail as therein mentioned; and by an indenture of May 20, 1902, Sir Francis Ernest Waller disentailed the real estate so devised.

Augustus Wise died intestate on January 12, 1912, and a person of unsound mind not so found. Letters of administration to his estate were granted to the defendant Henry Edward Disbrowe Wise, one of the sons of Henry Christopher Wise by a second marriage.

By an originating summons taken out by the plaintiff, Samuel Clark Smith, as surviving executor and trustee of the will of George Wise, it was asked, inter alia, whether, upon the true construction of the settlement in question, George Wise was entitled to share in the portions fund thereby created notwithstanding that he became entitled to the said settled estates by the death of his elder brother in the lifetime of his father.

F. E. Farrer, for the plaintiff. In *Windham* v. *Graham* (1), where the terms of the settlement were very similar to those in the present case, a younger son becoming an eldest son after his portion became vested but before it became payable was held not to be excluded from a share in the portions fund.

Jessel, K.C., and *Bryan Farrer*, for Sir F. Waller. George Wise takes an interest in the portions fund as a younger child. He became an "eldest son" after his interest in the portions fund had become vested on attaining twenty-one. In fact, the terms of the accruer clause in this settlement seem to have been founded on those in the settlement mentioned in *Windham* v. *Graham* (2), which was decided in 1826. The share cannot go to the executor of George Wise unless it first became indefeasibly

(1) 1 Russ. 331. (2) 1 Russ. 334.

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vested. The ultimate clause in the settlement of the portions fund, coupled with the accruer clause, corroborates the view that the portion became indefeasibly vested in George Wise in the events which have happened. [They also referred to *In re Wrottesley's Settlement* (1); Norton on Deeds, p. 439; Theobald on Wills, 7th ed. p. 282; Davidson's Precedents (Settlements), 3rd ed. vol. iii. pt. i. p. 420; Jarman on Wills, 6th ed. p. 1734.]

Ingpen, K.C., and *Crossfield*, for George Stonor. The settlement does not define the meaning of "eldest or only son." That is determined by the construction of the settlement, which overrides the general rule that an eldest son is the son who ultimately inherits the estate.

There is no illegality in the settlement providing, as it does, that a younger son becoming an eldest son may nevertheless share in the portions fund. It is a mistake to take the rule first and then, in the light of it, to read the document. The document should be construed first according to the well established principles enunciated in *Leader* v. *Duffey* (2), and then the rule applied to it.

H. S. Preston, for Brabazon Campbell.

P. O. Lawrence, K.C., and *A. L. Ellis*, for the administrator of Augustus Wise. *Windham* v. *Graham* (3) was an exceptional case not coming within the general rule which is there recognized as a rule. The present case is really covered by *In re Bayley's Settlement.* (4) The real question is what is the meaning of an "eldest or only son." George Wise having become the eldest son cannot take the portion intended for a younger child. It is against the ordinary presumption that he should have both the estate and a share in the portions fund. The time of distribution of the portions fund on the estate going to the eldest son is the time when the character of the son is to be ascertained, and at that time he was the eldest son. No doubt his interest was vested, but it was defeasible in the events which have happened. The insertion of the accruer clause in the settlement was necessary to prevent the portions fund being reduced on the happening of certain contingencies.

(1) [1911] 1 Ch. 708.
(2) (1888) 13 App. Cas. 294.
(3) 1 Russ. 331.
(4) L. R. 9 Eq. 491; 6 Ch. 590.

EVE J. By the settlement made on the marriage in June, 1828, of Henry Christopher Wise and Harriett Skipwith certain real estate was settled after the death of the survivor of the spouses upon the eldest son of the marriage in strict settlement, charged in the usual manner with sums (varying in amount according to the number of the children born of the marriage) by way of portions for his brothers and sisters. The first-born son of the marriage was Henry Christopher Wise the younger. He attained twenty-one and died in 1854, in the lifetime of his father and mother, a bachelor. The second son was George Wise, and he attained twenty-one in 1851, in the lifetime of his elder brother. The mother died in 1858, and the father in 1883, and George Wise thereupon became the tenant in tail in possession of the settled estates.

The question I have to determine is whether or not George Wise also became entitled to a share in the unappointed part of the sum raisable for portions. Prima facie, he did not. According to the rule of construction applicable to the circumstances, the expression "eldest son" in settlements of this nature is not equivalent to "first-born son," but means the son who eventually succeeds to the estate, or, putting it in another way, the question whether any son of the marriage is the eldest son or a younger son is determined when the estate vests in possession and not before, and it would seem that the mere fact that under the trusts of the settlement the son who by survivorship, then happens to be the eldest son, may have already attained a vested interest in the portions fund, does not operate to prevent the application of the rule, although the particular son is thereby divested of the interest already vested in him.

But the rule, in common with all other rules of construction, must be applied with due regard to the terms of the particular document under consideration. This has been emphasized by Lord Halsbury in the case of *Leader* v. *Duffey* (1), to which Mr. Crossfield has referred me, and the same thing has been said in other words in many other cases. What I have to do is to construe this particular instrument, bearing in mind the rule of construction to which I have already referred. The settlement

(1) 13 App. Cas. 294, 301.

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here, as is usual, reserves to the parents and the survivor powers of appointment over the portions fund, but these powers have not been exercised so as to deal with the whole fund, and a substantial part, some 6000*l.* or thereabouts, remains unappointed. As to this the deed provides that it is to vest in the children entitled to share in it on each of them attaining the age of twenty-one, or, in the case of daughters, marrying under that age; and then follows a declaration that the payment of any share vested in the lifetime of the father or mother is to be postponed until the death of the survivor of them. Then there is a clause the exact object of which I did not at first quite appreciate, whereby it is provided that if any of the children of the intended marriage for whom portions are intended being a son or sons shall die under twenty-one, or shall before attaining such age become an eldest or only son, or being a daughter or daughters shall die under twenty-one and without having been married, the share or interest in the portions fund of the child so dying or of the son so becoming an eldest or only son is to go to the survivor or survivors who shall live to attain a vested interest therein. The object of that clause is to prevent a reduction of the portions fund on the happening of any of the contingencies therein provided against. There is also a clause which provides that if all the children being a son or sons shall die under twenty-one or become an eldest or only son before attaining that age, and being a daughter or daughters shall die under that age without having been married, the portions are not to be raised, but are to sink into the freehold.

The question is whether the cumulative effect of these various provisions does not exclude the application of the rule to which I have referred. Those who assert that it does rely on *Windham* v. *Graham* (1) and maintain that the moment when the share in the portions fund vests, and not the moment when the estate falls into possession, is the one at which the position of the son in the family is to be determined. On the other hand, it is argued on the authority of *In re Bayley's Settlement* (2) that even in a case where the gift over was to take effect on a younger son becoming an eldest or only son before attaining twenty-one the rule was

(1) 1 Russ. 331. (2) L. R. 9 Eq. 491; 6 Ch. 590.

applied and the period of distribution held to be the date for determining whether a son was the eldest or a younger son, and accordingly that there is no substance in the argument founded on the form of the accruer clause in this settlement.

I do not think there is any conflict in the decisions in *Windham* v. *Graham* (1) and *In re Bayley's Settlement.* (2) The latter, as is pointed out in Mr. Davidson's volume on Settlements (Davidson's Precedents, 3rd ed. vol. iii. pt. i. p. 420), was not a case of portions proper, and although the Court of Appeal adopted the view that the rule of construction in question was equally applicable to a settlement of the nature there under consideration as to a settlement providing portions in the usual manner, and held further that on the construction of that particular settlement the rule was properly applied, the decision in *Windham* v. *Graham* (1) was not overruled or dissented from, though I rather gather that James L.J. entertained a doubt whether he would have arrived at the same conclusion as Lord Gifford had done. Moreover it is to be observed that Sir George Jessel in his argument in *In re Bayley's Settlement* in the Court below (3), after drawing attention to the fact that in *Windham* v. *Graham* (1) there were two funds, one of 6000*l.* and the other of 4000*l.*, adds, "there was no doubt that the 6000*l.* was to vest in the younger children at twenty-one," by which I think he means "indefeasibly vest." I cannot disregard the facts which have been pressed upon me in argument that *Windham* v. *Graham* (1) was decided in August, 1826, and the settlement I am construing was executed in June, 1828, and that the terms of this latter are practically identical with those of the 6000*l.* settlement in *Windham* v. *Graham* (1), and in these circumstances I think I should be wanting in respect to an authority well nigh 100 years old were I not to apply to the present document the same construction as was applied to an exactly similar document there. I hold, therefore, that, according to the true construction of this settlement, the question whether Mr. George Wise was the eldest or a younger son fell to be determined when he attained twenty-one, and that he is in this case a younger son for the purpose

(1) 1 Russ. 331. (2) L. R. 9 Eq. 491; 6 Ch. 590.
(3) L. R. 9 Eq. 494.

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of participating in the portions fund. I must answer the first question therefore in the affirmative.

Solicitors: *Stow, Preston & Lyttelton, for Campbell, Brown & Ledbrook, Warwick; Cain & Tompkins; Dawson, Bennett & Co.*

G. M.

EVE J. 1912 *Nov.* 7.

In re HANBURY'S SETTLED ESTATES.

[1912 H. 2000.]

Settled Land—Collieries—Works required by Coal Mines Act, 1911—*Improvements—Payment out of Capital—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25, *sub-ss. xix., xx.*

Upon a summons by a person having the powers of a tenant for life under the Settled Land Acts, asking that capital money under the Acts might be applied in payment of the cost of certain alterations of, and additions to, freehold and leasehold collieries (part of the settled land), required by the provisions of the Coal Mines Act, 1911:—

Held, that the works required were "improvements" within the meaning of s. 25, sub-ss. xix. and xx., of the Settled Land Act, 1882, and that the applicant was prima facie entitled to have them paid for out of capital; and the Court, in the exercise of its discretion, made the order.

The words "other preliminary works necessary or proper in connexion with development of mines" in sub-s. xix., though pointing primarily to operations incident to discovering whether minerals exist under the settled land, and to the procedure necessary or proper to enable the minerals, when their existence is proved, to be reached and worked, include also works (though not enlargements, improvements, or reconstructions within sub-s. xx.) which in the progress of working become necessary or proper for the development of a mine, "development" continuing so long as any part of a mining area remains to be opened up.

Construction of sub-ss. xix. and xx. by North J. in *In re Mundy's Settled Estates* [1891] 1 Ch. 399, adopted and applied.

SUMMONS.

The applicant was a person who had, under a settlement created by the will of a testator who died in 1903, the powers of a tenant for life under the Settled Land Acts, 1882 to 1890.

Part of the settled land consisted of freehold and leasehold collieries, which were open at the testator's death and which, in

accordance with an order of the Court in an action of *In re Hanbury, Comiskey* v. *Hanbury* [1905 H. 1082], the applicant was in possession of and was working, retaining the profits for her own use.

In order to comply with the provisions of the Coal Mines Act, 1911, it was necessary to carry out extensive alterations of, and additions to, the underground roads, refuge holes (s. 44), exits (s. 59), stables (Sched. III., cl. 3), meetings (s. 43), winding apparatus (s. 40), and ventilating fan (s. 31), at an estimated cost of 2629*l.* 12*s.*

The applicant submitted a scheme to the trustees of the settlement for the purposes of the Settled Land Acts, requesting them to approve the scheme and to provide for the necessary expenditure out of capital moneys under their control.

The trustees declining to take the responsibility, the applicant issued this summons that the trustees might be directed to, or alternatively the Court might, approve the scheme, and that capital moneys might be applied accordingly.

The summons was adjourned into Court.

P. O. Lawrence, K.C., and *Austen-Cartmell*, for the applicant. The effect of the Coal Mines Act, 1911, was, from the moment of its passing, to discount the value of all collieries. The applicant is replacing the depreciation brought about by the statute. It is always a matter of uncertainty whether a tenant for life or remainderman will reap the benefit in such cases.

The application is for the expenditure of capital upon "improvements" within the meaning of s. 25, sub-ss. xix. and xx., of the Settled Land Act, 1882. (1) Those sub-sections have been construed by North J. in *In re Mundy's Settled*

(1) Settled Land Act, 1882, s. 25: "Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works . . . . and any operation incident to or necessary or proper in the execution of any of those works . . . . or for securing the full benefit of any of those works . . . . (namely):

"(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

"(xx.) Reconstruction, enlargement, or improvement of any of those works."

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Estates. (1) Sub-s. xix. rather assumes that the works are to be done before the mines are opened; sub-s. xx., as explained by North J., refers to works done after. Here the works would have been required as absolutely necessary if the mines were about to be opened, and are therefore within sub-s. xx. Works which have become necessary owing to legislation are within sub-s. xx., subject to any criticism as to detail. On principle the cost of all these works should be allowed out of capital. In *In re Earl of Dunraven's Settled Estates* (2) Kekewich J. took a view which supports the applicant's contention. If the works are "improvements," the Court should in its discretion (3) make the order: *In re Earl of Egmont's Settled Estates.* (4)

Clayton, K.C., and *F. Whinney*, for the persons interested in remainder. These works are not "improvements" under the Settled Land Act, 1882. The Coal Mines Act, 1911, does not determine the incidence of the burden, though, so far as it does, it throws the obligation to do the works on the applicant as owner in occupation of the estate: *In re Barney.* (5) The onus is on the applicant to shew that the works are "improvements." It is not suggested that they are unless they are within sub-s. xix. or sub-s. xx. But under those sub-sections the works must be works which in the beginning have been preliminary. The tenant for life is not entitled to be allowed for what is merely incident to the ordinary working of the mines.

[EVE J. Apart from the view taken by North J. in *In re Mundy's Settled Estates* (1) I should agree that the works must have reference to unopened mines.]

The view of North J. is not a decision but a mere dictum. That case needs to be very carefully looked at. The works must have been at one time preliminary, and necessary or proper in connection with development. If a work which has been preliminary wears out, it may be reconstructed; if it is too small, it may be enlarged; if there are new inventions, it may be improved—in each case out of capital money. But it

(1) [1891] 1 Ch. 399.
(2) [1907] 2 Ch. 417.
(3) As the case is not thought to call for report on the question of discretion, the facts, arguments, and judgment, so far as they relate to that only, are not set out in full.
(4) [1906] 2 Ch. 151.
(5) [1894] 3 Ch. 562.

must have been preliminary in the first instance. Here none of the matters suggested can be allowed out of capital money, because they are all installed at a time when they can in no sense be said to be preliminary. These are ordinary expenses incident to working, and as such are thrown on the tenant for life notwithstanding anything in the Settled Land Acts.

But, even if they are "improvements," the Court ought not to exercise its discretion in favour of the applicant: *In re Keck's Settlement* (1); *In re Hunt's Settled Estates.* (2)

R. C. F. Cotton, for the trustees, left the matter in the hands of the Court.

P. O. Lawrence, K.C., in reply. The works are "improvements." The contention for the remaindermen would make "development" equivalent to "opening" of mines. That is too narrow a view. The true distinction is between equipping a mine for getting coal, and winning and hauling the coal when got. "Development" is a far wider term than "opening." It continues up to the end of getting at the very extremity of the furthest boundary of the mine. It is the gradual unfolding of the mine and bringing into existence its hidden seams. A mine is being developed to the last day of its life. Under sub-ss. xix. and xx., especially as construed by North J., all these works are proper to be paid for out of capital.

EVE J., after stating the facts. The first question to be decided is whether the expenditure is expenditure on works which are improvements within s. 25, sub-ss. xix. and xx., of the Settled Land Act, 1882, and, regard being had to the construction which North J. has put upon these two sub-sections,—a construction which I need hardly say is binding upon me, and with which I agree—the question falls to be determined upon the meaning to be attached to the words in sub-s. xix. "other preliminary works necessary or proper in connexion with development of mines." Mr. Clayton says—and, I think, rightly—that a material attribute of the particular works is to be found in the word "preliminary," and the sub-section, as it seems to me, points first to the operations incident to discovering whether there are

(1) [1904] 2 Ch. 22. (2) [1905] 2 Ch. 418.

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any minerals under the settled land, and then, when the existence of minerals has been proved, and the tenant for life is desirous of working them, to the procedure necessary or proper to enable them to be reached and worked. The sub-section deals with works preliminary to, and necessary or proper in connection with, development of mines. Having proved by boring or by sinking trial pits or by other means the existence of the minerals, the next question for the tenant for life is to ascertain what is necessary or proper to be done before he can reach and proceed to work the minerals. If the mineral be coal to be got by underground workings in the ordinary manner he must have a shaft to enable those whose duty it will be to drive the roads to get down to the place where the roads are to be driven, and the necessary appliances to prevent their being drowned or suffocated when they get there, and to afford them light by which to do their work. Further, the roads and shaft must be equipped with means for removing material and debris necessarily excavated in reaching the seams, and the roof of the excavations underground be artificially supported and made good. All these operations, and all other works the construction of which is necessary to carry the workman to the spot where the mineral is to be gotten, are, in my opinion, works preliminary to and necessary or proper in connection with the development of the mine, and I do not think that Mr. Clayton disputes that the expenditure on such items as I have just enumerated would be properly chargeable against capital. Nay, further I think he concedes that if, as the mine comes to be worked, it is necessary to improve or enlarge or reconstruct all or any of those works which, so far, have only been preliminary to the commencement of the mining operations, the cost of improvement, enlargement, or reconstruction may again properly be charged to capital.

But he urges, and it is with this part of his argument that I am most impressed, that, if in the progress of working some work becomes necessary which is neither an enlargement, improvement, or reconstruction of something originally a preliminary work, but which may nevertheless be necessary or proper for the development of the mine, that work is a new, not a preliminary, work, and although necessary or proper

in connection with development is really required for profitable working and must be paid for by those who enjoy the profits. The force of that argument lies in this—that, unless some such line of distinction be adopted, every work in connection with the development of the mine which its progress towards exhaustion renders necessary or proper would be liable to be paid for out of capital, although in the case of a mine in operation for many years it could not fairly be described as a work "preliminary to" the development of the mine. But the difficulty which I feel in adopting that view and laying down a hard and fast rule that no work is an improvement within the sub-section unless it is a work preliminary to the inception of the working of the minerals, or an improvement, enlargement, or reconstruction of such a work, is that in the winning of minerals involving the pursuit of a gradually retreating object it is well nigh impossible to say that no operation is a work preliminary to the development of that part of the mining area which still remains to be opened up and worked. In the present case the mineral area is 374 acres or thereabouts, capable, I will assume, of being developed from one pit or from several pits. Is the question whether a particular work is an improvement within the Act to be determined by the method of development adopted? I cannot think that would be logical. If half a dozen pits were sunk, the expense of all the works executed for reaching the minerals to be worked from each pit would prima facie, in accordance with what I have already held and what the defendants have conceded, be payable out of capital. Can it be right to hold that precisely similar works executed in contemplation and for the purpose of developing parts of the area lying at a distance from the single pit are not improvements within the Act simply because the limited owner has seen fit to develop the whole area from a single pit and has consequently postponed the execution of these works until the time for developing the more remote parts of the area has arrived? No doubt the longer a mine has been opened and at work the greater is the difficulty in separating work preliminary to development from work incident to the getting of the minerals, but, speaking broadly, I think one can safely assert that so long as any part of the area remains to be

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opened up development is going on, and at every stage in the operation of extracting all the workable coal from the area there may be works to be executed which are accurately described as works preliminary to development. In this case parts of the area have been developed and worked out, other parts are developed and are being worked, and again other parts are in process of development. Beyond these there is some part of which the development has not yet commenced. The recent statute in effect says, if you continue to work that which is now being worked or to develop that which is in course of development, and before you begin to develop that which is still untouched, you must equip your mine in a particular manner, and the expenditure of which the applicant is here seeking to be relieved is the cost of the new equipment which the law has imposed upon her as, in my opinion, amongst other things, a condition precedent to the development of that part of the mineral area which still remains untouched. In these circumstances, although I fully recognize the force of what Mr. Clayton has said, I hold that these are "preliminary works necessary or proper in connexion with development of mines," and accordingly that prima facie the applicant is entitled to require that they be paid for out of capital.

[His Lordship then considered whether in the exercise of his discretion he ought to refuse the application, and came to the conclusion that no case had been made out which would justify him in doing so. He accordingly made an order directing the trustees to approve the scheme and out of capital moneys in their hands under the Act to apply the sum of 2629*l.* 12*s.* in payment for the improvements.]

Solicitors: *Patersons, Snow & Co.; Walker, Martineau & Co.*

A. L.

BOWLES *v.* BANK OF ENGLAND.

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1912

July 23; *Oct.* 21; *Nov.* 4.

[1912 B. 2087.]

Revenue—Income Tax—Deduction from Dividends before Tax imposed by Statute—Bill of Rights (1 *W. & M. sess.* 2, *c.* 2)—*Customs and Inland Revenue Act*, 1890 (53 *& 54 Vict. c.* 8), *s.* 30—*Income Tax Assessment Act*, 1870 (33 *& 34 Vict. c.* 4), *s.* 1—*National Debt Act*, 1870 (33 *& 34 Vict. c.* 71), *ss.* 14, 15—*Revenue Act*, 1911 (1 *Geo.* 5, *c.* 2), *s.* 11.

A resolution of the Committee of the House of Commons for Ways and Means, assenting to income tax at a certain rate for the ensuing financial year (commencing April 6), does not, either per se, or after adoption by the House of Commons, authorize the Crown to levy on the subject the tax so assented to before the tax has been actually imposed by Act of Parliament; nor can the Bank of England, before the tax is so imposed by statute, lawfully deduct any income tax from the dividends payable by the Bank to a stockholder without the assent of the holder.

The effect of s. 30 of the Customs and Inland Revenue Act, 1890, and other statutory provisions—enacted to meet the inconvenience caused by income tax being a temporary tax, when it was intended but not yet enacted that the tax should be imposed for the ensuing financial year—stated and explained.

On May 31, 1912, the plaintiff, Mr. Thomas Gibson Bowles, purchased 65,000*l.* Guaranteed 2*l.* 15*s.* per cent. Stock (Irish Land Stock), and the stock was transferred into his name in the books of the Bank of England.

Sect. 28 of the Irish Land Act, 1903 (3 Edw. 7, c. 37), provides (1.) that "for the purpose of raising the money required for the Irish Land Purchase Fund, the Treasury may, by warrant addressed to the Bank of England or Bank of Ireland, direct the creation of a new capital stock (to be called 'Guaranteed Two and three-quarters per cent. Stock,' and in this Act referred to as 'the stock') consisting of perpetual annuities, yielding dividends at the rate of $2\frac{3}{4}$ per cent. per annum on the nominal amount of the capital"; and (2.) that "the annuities shall be payable by equal half-yearly or quarterly dividends, at such times in each year as may be fixed by the warrant first creating the stock."

By s. 29 of the same Act, "(1.) The dividends on the stock shall be paid out of the income of the Irish Land Purchase Fund, and, if that income is insufficient, shall be charged on and paid

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out of the Consolidated Fund of the United Kingdom or the growing produce thereof. (2.) Any sums so paid out of the Consolidated Fund shall be treated as a temporary advance to the Irish Land Purchase Fund and shall be made good out of the Guarantee Fund."

By s. 31 of the same Act, "the stock shall be transferable in the books of the Bank of England and the Bank of Ireland in like manner as other stock transferable under the National Debt Act, 1870, and shall be subject to the provisions of that Act and any enactment amending that Act, so far as is consistent with the tenor of this Act."

By s. 32, "for the purpose of calculating the annual sums payable to the Bank of England and the Bank of Ireland for the management of the National Debt, the stock shall be considered as part of the National Debt inscribed in the books of the Bank of England and the Bank of Ireland, but the annual sums so payable shall be paid as part of the expenses of the Land Commission."

By s. 14 of the National Debt Act, 1870 (33 & 34 Vict. c. 71), "the money from time to time and at any time issuable out of the Consolidated Fund and by this Act made applicable to the payment of the dividends on stock, shall, by order of the Treasury, without other warrant, from time to time be issued and paid to the respective chief cashiers of the Banks of England and Ireland by way of imprest and on account for the payment of those dividends."

By s. 15 of the same Act, "the chief cashier to whom money is from time to time so issued shall from time to time without delay apply the same in payment of the dividends on stock."

On April 2, 1912, the Committee of the House of Commons for Ways and Means passed a resolution approving of the imposition, for the financial year commencing April 6, 1912, of income tax at the rate of 1*s.* 2*d.* in the pound, and this resolution was reported to and adopted by the House of Commons on June 24, 1912.

The dividends on the stock were payable on January 1 and July 1, and on June 26 the plaintiff issued the writ of summons in the present action against the defendants, the Governor and Company of the Bank of England, claiming as follows: "(1.) An injunction restraining the defendants, their servants or agents,

from deducting, by way of income tax or otherwise, any sum whatsoever from the dividend of 900*l.* 12*s.* 6*d.* payable to the plaintiff on July 1, 1912, in respect of 65,500*l.* 2¾ per cent. Irish Land Stock, of which he is the registered owner; (2.) a declaration that the defendants, their servants or agents, are not entitled to deduct, by way of income tax or otherwise, any sum whatsoever from the dividend" aforesaid.

On June 28, 1912, the plaintiff, by leave, amended his writ by adding a claim for "a declaration that the defendants, their servants or agents, are not entitled to deduct, by way of income tax, any sum whatsoever from any dividend or interest payable by them upon the public funds or the said public stock before such tax is actually imposed by Act of Parliament," and also a claim for payment of 52*l.* 10*s.* 8*d.*, the amount of income tax to be deducted.

On the same day the plaintiff moved for an interlocutory injunction in the terms of the claim made by his writ.

Up to this time no warrant or authority from the Treasury had been issued, nor had any payment been made to the Bank of England under s. 14 of the National Debt Act, 1870, and no statute had been passed imposing income tax for the current financial year. (1)

On the hearing of the motion, the Bank contended that under ss. 14 and 15 of the National Debt Act, 1870, by which payment of the dividends on the stock was legalized, the Bank was not liable to the plaintiff in respect of any dividend unless and until money for that purpose had been actually issued to it out of the Consolidated Fund (2), but admitted that, if money to pay the July dividend should be so issued, the Bank intended to deduct income tax at 1*s.* 2*d.* in the pound, the rate mentioned in the resolution of the Committee for Ways and Means. The Bank undertook to pay any amount it might so deduct into Court, and on this undertaking no order was made on the motion, except as to the time for delivering pleadings and that the costs of the

(1) Income tax for the year beginning April 6, 1912, was charged, at the rate of 1*s.* 2*d.* in the pound, by s. 5 of the Finance Act, 1912 (2 & 3 Geo. 5, c. 8), which received the Royal assent on August 7, 1912.

(2) See *Davis* v. *Bank of England* (1824) 2 Bing. 393.

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motion should be costs in the action. His Lordship suggested that the Attorney-General should be joined as a defendant, and that a claim should be made for a declaration which would bind the Crown.

On June 29 the Bank of England received from the National Debt Office a warrant directing the Bank to write off from the account of the Commissioners for the Reduction of the National Debt a sum of nearly 657,000*l.*, described as the dividend due July 1 on Guaranteed 2¾ per cent. Stock.

On July 1 the Bank paid the plaintiff 848*l.* 1*s.* 10*d.*, being the amount of his dividend, 900*l.* 12*s.* 6*d.*, less 52*l.* 10*s.* 8*d.* for income tax, and paid into Court the amount so deducted.

On July 4, the plaintiff delivered his statement of claim, in which, after stating the facts, he repeated the claim made by his amended writ, but he did not join the Attorney-General as a party to the action.

The Bank, by paragraph 5 of its statement of defence, denied that the amount deducted was payable to the plaintiff on July 1, and, after referring to the resolution of the Committee of Ways and Means, it was stated that the Bank would, if necessary, contend that such resolution was sufficient authority to the Bank to make the deduction.

Paragraph 6 of the defence was as follows: "Further, and if necessary in the alternative, the defendants say that ever since the imposition of income tax by the Income Tax Act, 1842, the defendants have always been accustomed to treat such resolutions as aforesaid, or either of them, as sufficient authority to deduct income tax in respect of interest on Government stocks becoming payable after the passage of such resolution"—of the Committee or the House—"or either of them and before the passing of the Act of Parliament carrying out such resolutions; and the plaintiff was at all material times well aware of the said practice, and bought and held the said stock on the terms, as between him and the Bank of England, that deduction of tax under the said circumstances would in every case be made."

The Bank also submitted that the statement of claim disclosed no cause of action (*a*) because at the date of the writ no sum was due to the plaintiff in respect of the interest on the stock, and (*b*)

because there was no duty on the part of the Bank towards the plaintiff to pay the interest on the amount deducted, inasmuch as it was not alleged that the Bank had at any time received or even would receive from His Majesty's Government any money to pay the interest or the amount thereof corresponding to the income tax thereon.

The action came on for trial before Parker J. on July 23, 1912.

The plaintiff argued his case in person.

Romer, K.C., and *S. A. T. Rowlatt* appeared for the Bank of England.

The Plaintiff. There was due to me on July 1 a dividend of 900*l.* 12*s.* 6*d.*, which the Bank of England was under statutory obligation to pay, and from which the Bank has, without warrant of law, deducted 52*l.* 10*s.* 8*d.* in respect of income tax, although no such tax has been imposed by law. The question now raised was left open in *Bowles* v. *Attorney-General.* (1)

The Bank received in full on June 29, as part of 656,894*l.* 13*s.* 9*d.* (the exact and full dividend at $2\frac{3}{4}$ per cent. on 47,774,159*l.* 1*s.* 11*d.* of this stock), 900*l.* 12*s.* 6*d.* due and payable to me on July 1. Even if this fact were not thus proved the Court would assume it, for the Legislature has said that the full amount of dividend is to be provided, and, as Shadwell V.-C. stated in *Sloman* v. *Bank of England* (2), "Every Court of law ought to take it for granted that that which the Legislature says shall be done, has been done." The Bank, although it knew it would receive the 900*l.* 12*s.* 6*d.* in full, intended even before June 28, as is shewn by its already printed 2400 warrants, instead of paying it to me in full, to deduct, and in fact on June 29 did deduct, therefrom 52*l.* 10*s.* 8*d.* in respect of income tax at the rate of 1*s.* 2*d.* in the pound. That has never been received by me. No Act of Parliament had then or has now been passed imposing any income tax, or fixing any rate of income tax for the year April 6, 1912, to April 5, 1913, in and in respect of which this deduction was made.

Magna Charta is the law to-day, and by clause 12 as translated in the Book of Rights (Edgar Taylor, 1833, p. 23), "No scutage

(1) [1912] 1 Ch. 123, 137. (2) (1845) 14 Sim. 475, 486.

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or aid shall be imposed in our kingdom unless by the Common Council of our kingdom, except to redeem our person, and to make our eldest son a knight, and once to marry our eldest daughter; and for these there shall only be paid a reasonable aid." (1) The Common Council of our kingdom had not then taken the final form of Parliament as it now exists; which final form, in the unanimous opinion of the text-writers, was reached under Edward I., in the year 1295.

By clause 1 of the Statutum de Tallagio non Concedendo it is provided that "nullum talliagium vel auxilium per nos vel haeredes nostros de cetero in regno nostro imponatur seu levetur, sine voluntate et assensu communi archiepiscoporum, episcoporum et aliorum praelatorum, comitum, baronum, militum, burgensium et aliorum liberorum hominum in regno nostro." This document of the date of 1297 is referred to as a statute in the Petition of Right, and was decided by the judges in 1637 to be a statute: Stubbs' Select Charters, 5th ed. p. 497.

The Petition of Right (3 Car. 1, c. 1), after reciting the Statutum de Tallagio non Concedendo, and (clause 2) that nevertheless "your people have been . . . . molested and disquieted," proceeds (in clause 10) as follows: "They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament." The petition received the King's assent and is a statute of the realm.

The Bill of Rights (1 W. & M. sess. 2, c. 2) provides that "levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament for longer time, or in other manner than the same is or shall be granted, is illegal."

The creation of the stock now in question was authorized by s. 28 of the Irish Land Act, 1903, and s. 29 charged the payment of the dividends thereon upon the Irish Land Purchase Fund and, in case that should be insufficient, on the Consolidated Fund of the United Kingdom. By s. 31 it is enacted that the stock shall be transferable in the books of the Bank of England "in

(1) For the Latin text and commentary see McKechnie, Magna Carta, pp. 274 sqq., and cf. c. 14, p. 291.

like manner as other stock transferable under the National Debt Act, 1870, and shall be subject to the provisions of that Act, and any enactment amending that Act, so far as is consistent with the tenor of this Act."

[*Romer, K.C.* I do not see how the Bank is concerned to argue the proposition of constitutional law which is raised. The Bank is placed in the awkward position of being sued by Mr. Bowles if it deducts the tax, and of being sued by the Inland Revenue if it does not. The Bank is willing to hand over the money if protected by the Court's order.

PARKER J. I understood that paragraphs 5 and 6 of the defence are withdrawn.

Romer, K.C. Yes.]

Sect. 31 of the Irish Land Act, 1903, makes the stock transferable in the books of the Bank of England in like manner as other stock transferable under the National Debt Act, 1870, shewing that the most important of all operations, the manner of the transfer of the property in the stock, is provided for not by the Act of 1903, but by the Act of 1870. Then follow words shewing that the Act of 1870 is incorporated in the Act of 1903, and that the stock and the Bank and its servants are all bound by a statutory obligation. Sect. 32 contemplates the management of the stock by the Bank and enacts the method of calculating the sums payable to the Bank for that management, as if the stock were part of the National Debt. It is legislation by reference to the previous statute fixing the rate per million. What that rate is matters not, nor what the statute; nor does it matter that the payment for managing this Irish stock is paid by the Land Commission. My point is that the Bank is here endowed with an annual payment for management of the stock and with the duty of managing it, and is it to be said that, having by statute that management, as it has, and receiving by statute that payment, as it does, it is yet to be at liberty to repudiate that most important part of the management which consists in the payment of the dividend? I submit that if this stood alone, without the Act of 1870, it would impose an obligation to perform that part of the management which consists in paying the dividend.

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By s. 12 of the National Debt Act, 1870, sufficient money to pay the dividends on all stock, with the charges attending the same, is to continue to be from time to time issuable for that purpose out of the Consolidated Fund. Sect. 13 requires the Bank to employ fit persons as chief cashier and accountant. Sect. 14 says that the money made applicable for dividends is, by order of the Treasury, without other warrant, to be issued and paid to the chief cashier "by way of imprest and on account for the payment of those dividends," and s. 15 requires the chief cashier "without delay" to apply the money "in payment of the dividends on stock."

Which of the provisions of the National Debt Act, 1870, to which this Guaranteed Irish stock is subject so far as is "consistent with the tenor of this Act" (of 1903) is "not mutatis mutandis consistent therewith"? Is s. 17, enacting that the Bank shall not be required to allow executors or administrators to receive any dividend until probate of the will or letters of administration have been left with the Bank for registration? This is clearly consistent with and must be incorporated with the Act of 1903. So, too, ss. 18 and 19 of the Act of 1870 must be incorporated. Or take s. 20, empowering the Bank to send warrants by post—this must be incorporated. The Bank acted upon it in my case. In short, ss. 12 to 21 of the National Debt Act, 1870, are a bundle of sections one and all applicable to this stock.

Mutatis mutandis, the National Debt Act, 1870, is incorporated with the Irish Land Act, 1903, and, as regards this Land stock, its statutory obligations are imposed on the Bank. How can it be otherwise? The Treasury is liable to find the dividend out of the Consolidated Fund, in case the Irish Land Purchase Fund is insufficient; if it does find and issue the dividend out of the Consolidated Fund, then without any question ss. 12 to 15 apply and the statutory obligation is imposed. Can it be imagined that the Legislature intended an obligation on the Bank and its chief cashier to pay the dividend when it is provided by the Consolidated Fund, and not when it is provided by the Land Purchase Fund? If so, the stockholders' security for this dividend would be greatest when the Land Purchase Fund was

least able to pay and quite complete only when that fund was bankrupt; which as an intention of the Legislature is inconceivable.

Romer, K.C., and *S. A. T. Rowlatt*, for the Bank. It was not until June 29 that the Bank received the direction to write off the total amount of dividend on the stock from the account of the Commissioners for the Reduction of the National Debt (the amount being paid out of the Irish Land Purchase Fund) and to place it to the account of the Bank for payment of the dividend. Then by a formal document this sum was credited to the Bank. It was not until the amount of dividend was actually received by the Bank that the plaintiff had any right of action to recover it; but his writ was issued on June 26, whereas the action could only succeed if commenced after the cause of action had accrued. Then the amount representing the income tax on the total stock which is not exempt, less the amount paid into Court, is paid into the Exchequer. Sect. 24 of the Income Tax Act, 1842, makes "the Governor and Directors of the Company of the Bank of England"—not the Bank itself—"commissioners for executing this Act, for the purpose of assessing and charging the duties hereby granted" in respect of annuities and dividends payable by the Governor and Company; and by s. 93 the corporation is required to deduct the amount of duty before paying the dividends to the persons entitled, who on receipt of the residue are to "allow such payments in respect of the said assessments," and the corporation entrusted with such payment is to be "acquitted and discharged of so much money as if the same had actually been paid unto the persons to whom such annuities, profits, dividends and shares did or might belong, or were by law payable."

[PARKER J. Can the assessment be made before the amount of the tax is ascertained?]

The difficulty is appreciated, but it does not concern the Bank. The assessment was no doubt made by directors of the Bank as commissioners under s. 24 of the Income Tax Act, 1842.

[PARKER J. Would you like them to be added as parties?]

No; they are not in any way liable to the plaintiff.

[PARKER J. If I gave the plaintiff the relief he claims I should practically be deciding that the assessment was void. Therefore

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the Crown or the Commissioners of Inland Revenue are interested in arguing that the assessment is good. I assume that the deduction is done either with or without the authority of the Commissioners.]

The Bank receives notices from the Commissioners and from the Treasury itself directing it what to deduct and at what rate; this year it was simply an intimation as to the amount of tax mentioned in the resolution of the Committee of Ways and Means.

[PARKER J. I think you should give the Commissioners of Inland Revenue notice that the case is part heard and that from the arguments it appears to me that the interests of the Crown might be affected by my decision, and therefore I give notice to the Commissioners in order that they may appear, if they so desire, and state any case which they desire to make on behalf of the Crown.]

It might be better to direct payment of this small sum in Court to the plaintiff.

[PARKER J. No; I do not think it would, because the action is brought by Mr. Bowles simply and solely in what he conceives to be the public interest. It raises a point which is of importance from a constitutional and strictly legal point of view, and I think that, under the circumstances, the Court ought not to take advantage of technical points, but should help him to obtain a decision on the points he desires to have decided.]

We will communicate with the Commissioners.

The further hearing was accordingly adjourned, and the trial was continued and concluded on October 21.

The plaintiff again argued his case in person.

Romer, K.C., and *Howard Wright* (1), for the Bank of England, took no further part in the argument.

Sir Rufus Isaacs, A.-G., Sir John Simon, S.-G., Austen-Cartmell, and *W. Finlay*, for the Crown.

The Plaintiff in person continued his argument as follows.

(1) Mr S. A. T. Rowlatt had, in the meantime, been appointed a judge of the High Court of Justice.

The case has now passed from technicalities to the broad constitutional question raised. The proposition submitted is that no taxation can be levied in these realms except by Act of Parliament. That proposition was last challenged in a famous case in 1637(1), when the Crown was so unfortunate as to find law officers to advise that, in this respect, the power of the King was absolute and uncontrolled by law, and to argue in the Exchequer that the power of taxation rested not in Parliament but in the King. The decision in that case led to civil war and to the final establishment of the authority of Parliament.

The Bank of England, still the nominal defendant, has acknowledged that it did in fact receive in due time, on June 29, the full dividend on the stock, and did not on July 1 pay me my portion thereof. The National Debt Act, 1870, and the Irish Land Act, 1903, imposed a statutory obligation on the Bank to pay me the full dividend; hence the proposal of the Bank to pay me the 52*l.* deducted. But the defence of the Bank raises a contention of an original character, involving a point of high constitutional importance. Paragraph 5 of that defence claims that a resolution of the House of Commons is sufficient authority to levy income tax by deduction before the Act has been passed imposing the tax; while paragraph 6 declares that the Bank relies upon its own usage of treating such resolution as sufficient authority for such deduction. Counsel on behalf of the Bank withdrew paragraphs 5 and 6 and declared that they did not intend to argue the points involved in them. So far then as the Bank of England is concerned, paragraphs 5 and 6 of its defence are now abandoned; so that it appears that, so far as the Bank is concerned, I am entitled to the money in Court, as well as to the declaration asked for. But there remain the persons who are interested in disputing the constitutional point raised by the contention that there is no taxing authority in a resolution of the House of Commons. Those persons are the Lords Commissioners of the Treasury and the Crown, as represented by the Attorney-General.

The contention in paragraph 5 of the defence that a mere

(1) *Rex* v. *Hampden* (1637) 3 St. Tr. 826.

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resolution authorized a deduction of income tax is baseless. Here is the broad constitutional question. If a resolution alone has no authority, and if the practice of acting upon it as though it had authority is unlawful, then the principle is established for which I contend. Income tax is now the only tax (besides the Customs duty on tea) which expires annually and requires renewal. All the other taxes, direct and indirect, have now become (for it was not the old practice) permanent, and are imposed by permanent Acts of Parliament. These two alone are annual. On April 5 in every year, and except as to returns and arrears of previous years, the income tax dies and remains dead unless and until it is revived by Act of Parliament, and is reimposed, either at the old rate or at a new rate set by that Act; and only when so reimposed can it be levied or even assessed. About four-fifths of the total income tax is raised by deduction, or, to use the official term, "taxation at the source," and since in this present year beginning on April 6, 1912, the total amount estimated to be received from the tax is 44,100,000*l.*, it appears that (after deducting the relatively unimportant $3\frac{1}{2}$ millions estimated for super-tax) four-fifths of the remainder, or some $32\frac{1}{2}$ millions of pounds, will this year be levied by deduction at the source.

The defence of the Bank makes no reference to any Act of Parliament imposing the tax, but refers instead to a resolution of that part of Parliament called the House of Commons. It amounts to this, that there is no need for any Act of Parliament at all, or for any Parliament at all, but only for a House of Commons, and a mere expression of that House's opinion, even though that opinion may be revocable.

Standing Order 71 of the House, dating from February 16, 1667, ordered that if any motion be made in the House for any charge upon the people the consideration and debate thereof should not then be entered upon, but should be adjourned to a further day and then referred to a Committee of the whole House before any resolution or vote of the House passed therein: see Standing Orders of the House of Commons, 1911, p. 34. This interposes not only delay, in order that the House may not be lightly hurried into new taxes, but also a preliminary

discussion in a less formal committee, where each member may speak more freely, and as often as he pleases, before it comes to the House itself, where each member can speak only once. But the resolution in committee is of no avail and of no validity at all until it is reported to and agreed to by the House, for when it is reported it may, by the House, be rejected, or varied, or recommitted for further consideration to the committee whence it is derived. And even when the House itself has agreed to the committee's resolution, and thus made it a resolution of the House, that does not bind the House, except in this, that the House may not in its Bill founded on the resolution impose a greater charge or tax than its own resolution has fixed. But when it comes, at a subsequent stage, to debate in committee on the Bill itself, the House may depart from that resolution. It may impose in the Bill either a less charge or tax, or none at all, as was done with the advertisement duty in 1853. In the words of Queen Elizabeth's Secretary of State Sir Thomas Smith (Commonwealth of England, ed. 1635, p. 89 (1)), "the agreement of these committees is no prejudice to the House. For at the last question they will either accept it or dash it as it shall seeme good, notwithstanding that whatsoever the committees have done." And so the final act of the Commons is the third reading, till which nothing is finally settled even by the Commons, quite apart from the assent and advice of the other two estates of the realm, and apart from the Royal assent still needed to make the Bill into an Act of Parliament.

The defence does not suggest that there was any resolution of the House before June 24, 1912, when the House had reported to it, and for the first time knew of and agreed to, the resolution passed in the Committee of Ways and Means on April 2, "That income tax shall be charged for the year beginning April 6, 1912, at the rate of 1*s.* 2*d.* in the pound." That resolution was of no validity or binding authority either upon the House or upon the subject. Even before the resolution of the House was passed, on and from April 5 to June 23, when as yet there was no resolution

(1) P. 57 in the more convenient edition by Mr. F. Alston, Cambridge 1906. The procedure described by Sir Thomas Smith is that of referring a bill to a special committee for amendment.

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of the House, the Bank assumed to deduct, and did deduct, income tax by virtue of such a supposed resolution. So that the Bank claims not only that there is no need for an Act of Parliament, but that there is no need even for a resolution of the House of Commons, and that a mere resolution of a committee, as yet unreported to and unknown to the House, carries with it full authority to tax the subject. Even if the House itself has agreed to a resolution imposing income tax there is no taxing authority in such a resolution.

"In the imposition and alteration of taxes the effect given to a vote of the Commons in anticipation of the passing of a statute is more remarkable than in the voting of supplies. It has been customary for the Government to levy the new duties instead of the duties authorized by law immediately the resolutions for that purpose have been reported from a committee, and agreed to by the House, or from the date expressed in such resolution, although legal effect cannot be given to them by statute for some weeks, and may ultimately be withheld by Parliament. It is obvious that this custom is not strictly legal": Sir Erskine May's Parliamentary Practice, 8th ed. (1)

The illegality has been admitted by the Treasury itself. On July 5, 1901, the Treasury issued from the Exchequer and paid a dividend on Consols created by the Loan Act, 1901, although the Act charging that dividend on the Consolidated Fund and authorizing the issue and payment had not yet received the Royal assent, which was not given till August 17, payments being made on July 5. The Treasury, when brought to book by the Comptroller of the Issues of the Exchequer, excused itself by alleging a resolution of the House of Commons; but on the question being laid before the law officers of the Crown, then Sir Robert Finlay and Sir Edward Carson, they decided that the Treasury was wrong and its action unlawful; and Mr. Blain, representing the Treasury, on being asked by the Chairman of the Public Accounts Committee, "I suppose you will agree that there was an infraction of the statute?" replied, "After the law officers' opinion we certainly must agree as to that. Of course the Treasury would feel all the more bound in any future case that

(1) Rewritten in the current (eleventh) ed. See p. 81, post.

nothing of the sort should happen, so far as they could prevent it": see Fourth Report of Committee of Public Accounts, Parliamentary Papers, 1903, vol. 5, pp. xiv. and 240; questions 3479—3480.

Probably he meant an infraction of the law. The Court is invited to believe that a resolution sufficed, that there need be no Act, that vast powers of taxation have sprung from the mere opinion or resolution of a House of Commons, and that the taxing power has passed from Parliament into the hands of the Department of Inland Revenue and the Bank of England. Resolutions in any case are unknown to this Court. The only taxing power in this realm resides in Parliament. The only authority to levy any tax, whether by deduction or otherwise, is to be found in an Act of Parliament. Where there is no Act there is no taxing authority.

The statutes themselves prove that it cannot have been the practice of the Bank to deduct income tax in reliance on a resolution of the House of Commons ever since the coming into operation of the Income Tax Act, 1842. The first Income Tax Act—that of 1842—received the Royal assent on June 22, 1842, and imposed an income tax for three years, till April 5, 1845. This tax being imposed for three years, there was no need for or possibility of any foreshadowing resolution in 1843 or 1844, and in those two years, therefore, the practice did not—for it could not—exist. Next came the Act of 1845 (8 Vict. c. 4), also for three years, ending April 5, 1848, which received the Royal assent on April 5, 1845. Here again there was no resolution, and therefore no such practice possible in 1845, 1846, or 1847. The next Income Tax Act (11 Vict. c. 8) was also for three years, from April, 1848, to April, 1851. This Act did not receive the Royal assent till April 13, 1848, and in that year, though not before, was the first possible instance of the practice. It was then for seven days at most. But the practice was not indulged in—for it could not be—in either of the subsequent years, 1849 or 1850. In 1851 the second instance of it occurred; in 1853 the third. The Act of 1853 (16 & 17 Vict. c. 34) imposed the tax for seven years, ending April 5, 1860. Therefore the practice again had no possible place either in 1854, 1855, 1856, 1857, 1858, or 1859.

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Neither had it in 1860, when the Royal assent was given to the Act for that year (23 Vict. c. 14) on April 3, or three days before the practice could possibly take effect. So that the statutes are inconsistent with the statement in the Bank's defence that this practice began with 1842.

It began in 1861, since when it has been almost but not quite continuous, for in 1880 the Royal assent was given to the Act (43 Vict. c. 14) on March 24, so that the alleged practice did not and could not then occur. But in all other years from 1861 to 1908 the practice has been pursued for periods ranging from three days in 1900, when Lord Salisbury was First Lord of the Treasury, up to four months in 1882, when Mr. Gladstone filled that post. Yet only in 1910 and 1911 has the duration of the practice risen from what was until then the rare maximum of four months. In 1910 the practice was followed during seven months, and in 1911 during eight months. For seven months in 1910 and eight months in 1911 the Treasury forgot its promise of 1903 that in future nothing of the sort should ever recur, and stood by allowing, encouraging, and directing the levy of taxes without warrant of law. Even if such a practice had existed as alleged in the defence ever since the imposition of income tax by the Income Tax Act, 1842, that would not justify it. It cannot be pretended that the practice has grown into a custom which this Court will recognize. Even if it has grown into a custom, it is a bad custom, to which the maxim "Malus usus abolendus est" applies.

The principle that the subject cannot be taxed without consent, or otherwise than by law, is as old as history. It was affirmed by the laws of King Alfred. It was adopted and confirmed even by the laws of William the Conqueror. (1) All the earlier great jurists have asserted it, from Bracton in the thirteenth century to Sir John Fortescue in the fifteenth century, who in his De Laudibus Legum Angliæ says (see translation by Robert Mulcaster, ed. 1567, c. 9, pp. 25, 26): "The Kynge of England cannot alter nor change the lawes of his royalme at his pleasure"; "he (2) can neither change

(1) [There does not appear to be any textual authority for these statements; and taxation in the modern sense had not come into being, as Mr. McKechnie has pointed out.—F. P.]

(2) [In the original any constitutional king, "rex politice imperans genti suae."—F. P.]

lawes without the consent of his subjects, nor yet charge them with straunge impositions against their wylles." So, too, say the later authorities, from Selden to Hallam, and also the statutes.

I challenge the Attorney-General to present any authority suggesting that the power of taxation is to be found in anything whatever save and except an Act of Parliament.

Sir Rufus Isaacs, A.-G., and *Austen-Cartmell* (*Sir John Simon, S.-G.*, and *W. Finlay* with them), for the Crown. Although the Crown and the Commissioners of Inland Revenue are not parties to the action, we have attended at the Court's desire to assist the Court. The general propositions laid down by the plaintiff are beyond dispute; but the question to be determined does not depend on the statutes referred to by him or on the larger proposition which he has stated, but on the construction of a number of statutes as to income tax and on the regard which ought to be given to a practice which has existed at least since 1861.

One has to consider what effect must be given to the resolutions of the Committee of Ways and Means and the House of Commons passed before the income tax statute for the financial year was actually passed, and one cannot refer to the income tax without considering what has for years been the custom of the House of Commons. We wish to guard against any admission that Customs duties stand on the same footing as income tax.

[PARKER J. It will be better to leave out any discussion as to Customs duties.]

Our argument, then, will be confined to income tax. The financial year ended, as to income tax, on April 5. The resolution of the Committee of Ways and Means as to the rate of the tax was passed on April 2, 1912, and reported to the House of Commons on June 24. On the same day a Bill was introduced levying the tax, and this received the Royal assent on August 7. In the interval between the two resolutions, namely, on May 31, the plaintiff purchased his stock, the dividend on which was payable on July 1. Before that date, namely, on June 26, the plaintiff commenced the present action. In this year, as in preceding years from 1861, the Royal assent to the Bill was obtained long after the resolutions. In fact that assent must necessarily follow

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the resolutions. The Act cannot increase the rate of tax fixed by the resolutions, but may reduce it or impose no tax at all. It is obvious, when one considers what has happened, that the loss to the public revenue would be great if steps were not taken to collect the tax in the interval before the Act was passed. That was the origin of deducting tax before the Act was passed. The policy has always been to deduct the tax at the source of income, as that is the most convenient and the surest way of obtaining payment. The Bank directors are by the Income Tax Act, 1842, made commissioners, and they first assess the tax, which is then deducted from the dividend and then paid to what is now the account of the Inland Revenue. All that is under the Act of 1842. The practice of deducting before the Act seems to have begun in 1842, as the Act did not receive the Royal assent till June of that year. The practice has existed at any rate since 1861. There would be loss if the practice were not followed, the difficulty being—I do not say in Mr. Bowles's case—in having to follow the person who has received his dividend without the deduction.

By s. 24 of the Income Tax Act, 1842, the Governor and Directors of the Bank are appointed commissioners for executing the Act, for the purpose of assessing and charging the duties in respect of dividends payable out of the revenue of the United Kingdom, and these commissioners are given all the powers of the Act, as fully as the General Commissioners, so far as the same relate to the duties assessed and charged by the Governor and Directors. By s. 88 of the same Act the duties referred to in Sched. C are to be charged and assessed under certain rules to which statutory authority is given. Then, by s. 89, for the assessing and charging of the annuities and dividends payable out of any public revenue, the corporations having the distribution or payment of the annuities or dividends are, as often as the payments become due, to render accounts of the amounts of annuities and profits, and the amount of duty chargeable thereon, so that the part or dividend of each person may be distinctly "charged and assessed to the duty," and the commissioners are from time to time to make an assessment of the duty chargeable on the accounts, and the Commissioners for Special Purposes are

forthwith required to certify, amongst other things, the total amounts of duty. By s. 93 the corporations entrusted with payment of the annuities or dividends are, on notice of the assessment, —which is to be given when the annuities are payable—to set apart and retain the amount of duty so assessed, and such setting apart and retention is to be deemed, on payment of the residue, as payment to the person entitled to annuities or dividends. By s. 94 all moneys so set apart at the Bank of England are to be paid over to the account of those who are now the Commissioners of Inland Revenue.

There are similar provisions in later Acts as to foreign and colonial securities.

As your Lordship found in *Bowles* v. *Attorney-General* (1), income tax is now "in substance a permanent tax," and since it has been so inconvenience has been felt by reason of the tax being reimposed from time to time for one year only without adequate provision being made for the next income tax year. In *Bowles* v. *Attorney-General* the Court guarded itself against saying that existing statutory provisions would justify a collection of the tax before it was actually imposed by statute. (2) That is the point which now arises for decision, and no doubt different considerations apply from those which were applicable in *Bowles* v. *Attorney-General.* (1)

The resolutions of the Committee of Ways and Means and of the House of Commons must have some and great effect. They operate, at any rate, as a declaration of the House of its intention to impose a particular tax at a particular rate and that an Act will be passed to give effect to that intention. If the Act is passed in the sense of the resolutions, the resolutions are in the meantime effectual to authorize the imposition of the tax.

[PARKER J. The effect would be strange, as payment could be pleaded in respect of the amount retained.]

If no Act were passed the amount would have to be repaid.

[PARKER J. Not by the Bank, because deduction equals payment.]

The Bank has to retain the amount of the tax and pay over the

(1) [1912] 1 Ch. 123, 132. (2) [1912] 1 Ch. 137.

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balance. The resolutions point out the rate for the year, and when the Bank makes the assessment it knows the amount and sets it aside, and so far as the Bank is concerned that is payment. But if no Act were passed the taxpayer would have the right to have his money back.

[PARKER J. How could he enforce it?]

Presumably by petition of right.

[PARKER J. The Courts would have great difficulty in making the Crown refund money which had certainly been spent. The subject might have to go for damages against the Ministers.]

In some way or other the subject would get a return of his money. It must be presumed that there would be some money left in the Exchequer when proceedings were begun, and what would be the particular procedure for obtaining the return is not now material.

The present practice is that on the resolution of the Committee of Ways and Means being reported to the House the Chancellor of the Exchequer introduces his Finance Bill for the year. If a statement were made that it was not intended to follow up the resolution by a Bill to give effect to it, something might be said against the present practice.

The inconvenience of holding the practice to be illegal is obvious. Before the Act passed every one would come for a return of his money. Take the case of interest on a mortgage, in which the deduction of tax is made by the mortgagor.

[PARKER J. That is interesting, because the mortgagor deducts and can plead payment although the Commissioners have not got the money.]

The difficulty has been present to the mind of the Legislature, which from time to time has bridged over the gaps.

The three methods adopted for obviating the inconvenience are stated in *Bowles* v. *Attorney-General.* (1) No one expects that in our time there will be a year when there will be no income tax. As your Lordship said there, "it is in substance a permanent tax, and the officials responsible for its collection are in fact permanent officials."

The preamble to the Income Tax Assessment Act, 1870

(1) [1912] 1 Ch. 123, 132.

(33 Vict. c. 4), which received the Royal assent on March 25, 1870, says: "Whereas in order to ensure the collection in due time of any duties of income tax which may be granted for the year commencing the 6th day of April, 1870, it is expedient that the provisions of the Income Tax Acts relating to assessment should be applied to such duties before the same are granted." Then s. 1 enacts that "All such provisions contained in any Act of Parliament relating to the duties of income tax as are in force at the date of the passing of this Act shall have full force and effect with respect to any duties of income tax which may be granted for the year commencing the 6th day of April, 1870, in the same manner as if such duties had been actually granted, and the said provisions had been applied thereto; provided that nothing in this Act shall be deemed to continue or put in force" 32 & 33 Vict. c. 14, ss. 6 and 7, "or to continue the rates of income tax granted by that Act."

[PARKER J. You cannot assess the amount of tax payable until you know the rate. It is inconceivable that the Legislature meant you could act on the resolution; it does not say so.]

We cannot find that the Acts anywhere shew that "assessment" has two different meanings. Its meaning throughout is the meaning given to it by the Act of 1842.

[PARKER J. Suppose the resolution were passed after the commencement of the financial year, say on May 1, how would the deduction be made?]

Presumably at the rate of last year's tax.

[PARKER J. Some limitation must be put on the words "all such provisions."]

The section was intended to bridge over the gap. It is not confined to returns, and must apply to assessments. This view is confirmed by ss. 2 and 3 of the same Act.

[PARKER J. Suppose there were a resolution and then there were an adverse majority and a Ministry which advised prorogation. During the prorogation the Crown would be in possession of the tax money and might do without taxation by Parliament.]

That supposes that there would be no Appropriation Act, which the law of Parliament requires you to have.

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[*The Plaintiff.* Pitt did without an Appropriation Act. See May's Constitutional History, vol. i. pp. 72, 83; Todd's Parliamentary Government in England, 2nd ed. pp. 215, 243.]

They did things then that no Government would think of doing now. The object of the proviso to s. 1 is to guard against the view that you need not pass an Act imposing the tax.

The Acts have from time to time bridged over the gap for one year, and we say that the bridging over includes assessment for duty. By the Customs and Inland Revenue Act, 1873 (36 Vict. c. 18), s. 8, it is provided that "in order to insure the collection in due time of any duties of income tax which may be granted for the year commencing" April 6, 1874, "all such provisions contained in any Act relating to the duties of income tax as are in force on" April 5, 1874, "shall have full force and effect with respect to the duties of income tax, which may be so granted in the same manner as if the said duties had been actually granted, and the said provisions had been applied thereto by an Act of Parliament passed on that day: provided that nothing in this section shall be deemed to render necessary or authorize the appointment of assessors for such of the said duties as may be payable under Schedules (A.) and (B.) of" 16 & 17 Vict. c. 34, "or to continue the rates of income tax granted by this Act." That Act received the Royal assent on May 15, 1873, and the Act itself, by s. 6, granted the income tax for the then current financial year. Sect. 8 made provision for the next financial year.

[PARKER J. Does not "due time" mean the time when the tax should be collected.]

It means that the gap is to be bridged over. This practice of providing for the next financial year was followed for some years; but by the Customs and Inland Revenue Act, 1890, s. 30, there is a general provision that "in order to ensure the collection in due time of any duties of income tax which may be granted for any year commencing on the 6th day of April, all such provisions contained in any Act relating to income tax as were in force on the preceding day shall have full force and effect with respect to the duties of income tax which may be so granted in the same manner as if the said duties had been actually

granted by Act of Parliament, and the said provisions had been applied thereto by the Act." That provision has been applicable ever since 1890 and authorizes assessment although no Act has been passed. It is noticeable that it distinguishes between duties which may be granted and those which are actually granted. The resolutions have not always been passed before the commencement of the financial year, but in 1912 they were passed before such commencement. It is noticeable that, as regards Customs duties, there is a recognition by statute of resolutions of the House of Commons in s. 18 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), which provides that " in all cases where any new duties of Customs or other duties, rates, or charges under the management, collection, or control of the Commissioners of Customs are or may be imposed by any Act of Parliament, or by any resolution of the House of Commons, in lieu of any duties payable at the time of the passing of such Act, such former duties " are to continue payable " except in cases where the Act or resolution imposing such new duties shall otherwise provide."

[PARKER J. That seems to recognize that Customs duties may be imposed by resolution of the House of Commons.]

Sect. 2 of the Isle of Man (Customs) Act, 1887 (50 & 51 Vict. c. 5), gives effect in certain cases to resolutions of the Court of Tynwald imposing or varying Customs duties in the Isle of Man before an Act is passed.

To return to s. 30 of the Act of 1890, that makes permanent the machinery of the Income Tax Acts as regards both the assessment and the charge of the duty; but the matter has not been left there, for s. 14 of the Revenue Act, 1911 (1 Geo. 5, c. 2), provides as follows: " (1.) Where in any income tax year any half-yearly or quarterly payments have been made on account of any dividend, interest, or other annual profits or gains, previously to the passing of the Act imposing the tax for that year, and income tax has not been charged thereon or deducted therefrom, or has not been charged thereon or deducted therefrom at the rate ultimately charged for the said year, the amount not so charged or deducted shall be charged under Schedule D in respect of those payments as profits or gains not charged by virtue of any

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other schedule in accordance with the provisions contained in the sixth case of Schedule D in section 100 of the Income Tax Act, 1842, and the agents entrusted with the payment" are required to furnish certain lists. "(2.) Any person liable to pay any rent, interest, or annuity, or to make any other annual payment, shall be authorised to make any deduction on account of income for any income tax year which he has failed to make previously to the passing of the Act imposing the tax for that year, or to make up any deficiency in any such deduction which has been so made, on the occasion of the next payment of the rent, interest, or annuity, or making of the other annual payment after the passing of the Act so imposing the tax, in addition to any other deduction which he may be by law authorised to make, and shall also be entitled, if there is no future payment from which the deduction may be made, to recover the sum which might have been deducted as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing income tax for the year had been in force. (3.) In this section the expression 'income tax year' means the year commencing the 6th day of April." These provisions assume that deductions have been made, and must mean made lawfully and not in the manner of Hounslow Heath, and this is a statutory recognition of the existence of a lawful parliamentary practice, for "failed to make" shews that the person was bound to make the deduction although the taxing Act had not been passed.

[PARKER J. The enactment may also be a provision for what is to be done when persons do not recognize the legality of the practice.]

The Finance Act, 1894 (57 & 58 Vict. c. 30), which received the Royal assent on July 31, 1894, and by s. 33 imposed income tax for the year commencing April 6, 1894, also contains a provision, in s. 38, recognizing the legality of the practice now complained of. Such a provision as s. 38 was not again repeated until 1901, when s. 12, sub-s. 4, of the Finance Act, 1901 (1 Edw. 7, c. 7), provided that s. 38 of the Act of 1894 should be applied with respect to the year which commenced on April 6, 1901. Subsequently the provision was repeated in some but not all of the Finance Acts. A similar provision appears in s. 10, sub-s. 4,

of the Finance Act, 1902 (2 Edw. 7, c. 7). In 1903, s. 5, sub-s. 3, of the Finance Act of that year (3 Edw. 7, c. 8) applies s. 10 of the Customs and Inland Revenue Act, 1883 (46 & 47 Vict. c. 10), as if that section had been re-enacted "with the necessary change of date" of the financial year. In 1904, by s. 7, sub-s. 4, of the Finance Act, 1904 (4 Edw. 7, c. 7), s. 38 of the Act of 1894 was again applied, with the necessary change of date. There is no similar provision in the Finance Act, 1905 (5 Edw. 7, c. 4), the Finance Act, 1906 (6 Edw. 7, c. 8), the Finance Act, 1907 (7 Edw. 7, c. 13), or the Finance Act, 1908 (8 Edw. 7, c. 16), but s. 65 of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), again applies s. 38 of the Act of 1894 with the necessary change of date.

In Sir Erskine May's Parliamentary Practice, 11th ed., the author refers at p. 556 to grants voted in Committee of Supply. At p. 589 he says: "The resolutions which form the usual basis of the Chancellor's statement are the resolutions for the continuance, during the ensuing financial year, of the Customs duty upon tea, and of the income tax duty, as these duties are the only duties not, at present, made permanent by statute, and upon these resolutions, when agreed to by the House, the Bill is introduced which gives legislative effect to the financial objects of the Government." In a note he adds: "An anticipatory authority is imparted by usage to the resolutions of the Committee of Ways and Means which impose or alter taxation. Under orders from the Treasury, although statutory legal effect may not for some time be given to these resolutions, the reduced or the increased duties are collected from the date prescribed by the resolutions, as soon as they are agreed to by the Committee, and from the day following that upon which they are agreed to by the Committee when no date is specified in the resolution. These proceedings are, at the time, without legal authority; but they are subsequently legalised by the statute under which these altered duties are levied." The effect of the resolutions is conditional on a statute being subsequently passed.

The question raised is a new one which has never before come before an English Court; but it has been raised in some of the Colonial Courts. In *Stevenson* v. *The Queen* (1) a similar point

(1) (1865) 2 Wyatt, Webb, and à Beckett, 143, 176.

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was before the Supreme Court of Victoria; and in *Ex parte Wallace & Co.* (1) the Supreme Court of New South Wales refused to grant a writ of mandamus to persons to whom the Collector of Customs had refused to give bills of entry for certain goods until there was paid thereon certain duty which had then been imposed only by a resolution of the House of Assembly. The practice of the British House of Commons and Government is referred to in both cases.

In Todd's Parliamentary Government in England, vol. i. p. 513, there is the following statement: "Pending the ultimate decision of Parliament upon any Bill for the imposition or alteration of taxes, it is customary for the Executive Government, upon their own responsibility, to give immediate effect to resolutions altering existing rates of duty, or imposing new duties, as soon as they have been reported from Committee, and agreed to by the House. But this does not prevent the substance of such resolutions from being again discussed, at future parliamentary stages, with a view to their amendment or rejection. Meanwhile, the new taxes are authorised to be collected by Government, from the day named in the resolution, or from the date of passing the same, because it is not doubted that the Bill which imposes them, as from the date of the resolution whereon it is founded, will become law, by the concurrence of the two other branches of the Legislature. If such concurrence be withheld, the resolution becomes inoperative, and the duties levied by anticipation must be repaid to the parties from whom they had been collected."

In Lord Halsbury's Laws of England, vol. xxi. p. 775, par. 1455, the following passage occurs: "The financial proposals of the Government are carried in the form of resolutions moved by the Chancellor of the Exchequer, or some other Minister in the Committee of Ways and Means. These resolutions require confirmation by an Act of Parliament and the assent of the Crown before they have the force of law, but, in order to safeguard the revenue and to prevent forestalment, any resolution for the imposition of a new tax or the renewal of an old one, or for the increase of a duty, is acted upon as soon as it has been agreed to by the Committee of Ways and Means."

(1) (1892) 13 N. S. W. L. R. 1.

The position seems to be correctly stated in Todd's Parliamentary Government in England. The validity of the resolutions depends on the statute imposing the tax being passed in the same session of Parliament. The practice attacked is a fairly convenient one when the Government is prepared to pass the Bill, but it becomes inconvenient when the Bill is long postponed, and there may be a change of Government before the Bill becomes a statute.

The Court has a discretion as to whether it will grant the relief asked for, and it is submitted that the relief ought not to be granted. [They also referred to s. 111 of the Income Tax Act, 1842; the Taxes Management Act, 1880 (43 & 44 Vict. c. 19); and *Barrow* v. *Arnaud*. (1)]

The Plaintiff in reply.

Cur. adv. vult.

1912. Nov. 4. PARKER J. On June 26, 1912, the plaintiff, who is the owner of 65,500*l*. Guaranteed 2¾ per cent. Stock, the dividends on which are under 3 Edw. 7, c. 37, payable half-yearly on January 1 and July 1, issued his writ in this action against the Bank of England claiming a declaration that the Bank were not entitled to deduct by way of income tax or otherwise any sum whatever from the dividend payable on such stock on July 1, 1912, and an injunction consequent upon such declaration. On the hearing of a motion for interlocutory relief the defendants contended (in my opinion correctly) that under ss. 14 and 15 of the National Debt Act, 1870, by which payment of the dividends on the stock in question is regulated, they were under no liability to the plaintiff in respect of the payment of any dividend unless and until money for that purpose had been actually issued to them out of the Consolidated Fund. They admitted, however, that if, as there was no reason to doubt, money for the purpose of paying the July dividend should be so issued, they intended to make a deduction in respect of income tax at the rate of 1*s*. 2*d*. in the pound, being the rate mentioned in a resolution of the Committee of the House of Commons for Ways and Means, passed on April 2, 1912, and reported to and

(1) (1846) 8 Q. B. 595.

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adopted by the House itself on June 24, 1912. After some discussion the Bank undertook to pay any amount they might so deduct into Court. This was subsequently done, and thereupon the plaintiff amended his writ by asking (inter alia) for payment of the amount deducted. His action thus ceased to be an equitable action for an injunction, and became an action to enforce a legal right. I am of opinion that the Bank, having been put in funds for the purpose, came under a statutory liability to pay the plaintiff the dividend due to him on July 1, 1912, and that the only question I have to decide is the legality of the deduction they made. I mention this because it was suggested in the course of the argument that this was an action asking for relief as to the granting of which the Court had a discretion. I do not take that view. In my opinion, the plaintiff is entitled to have the legal point decided, and whichever way it be decided, it will be convenient to embody the decision of the Court in an appropriate declaration.

Upon the action first coming on for trial it seemed to me that the interests of the Crown were indirectly if not directly affected, and, following what I believe to be the usual practice, I adjourned the matter in order that the Crown might have the opportunity of being represented. In the result the Attorney-General appeared on behalf of the Crown, and I have had the advantage of hearing his argument on the question arising for decision.

This question may be stated as follows: Does a resolution of the Committee of the House of Commons for Ways and Means, either alone or when adopted by the House, authorize the Crown to levy on the subject an income tax assented to by such resolution but not yet imposed by Act of Parliament? Apart from the effect of certain provisions contained in the statutes relating to the collection of income tax, to which I shall presently refer, this question can, in my opinion, only be answered in the negative. By the statute 1 W. & M., usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights still remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any

infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation, no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever. Such resolutions are necessitated by a parliamentary procedure adopted with a view to the protection of the subject against the hasty imposition of taxes, and it would be strange to find them relied on as justifying the Crown in levying a tax before such tax is actually imposed by Act of Parliament.

I did not, however, understand that the Attorney-General on behalf of the Crown really dissented from this position. His contention was that in the case of income tax there is statutory authority for its collection by the Crown after the resolution of the Committee of the House of Commons for Ways and Means assenting to its imposition and before the passing of the Act by which it is subsequently imposed. This contention necessitates consideration of the Acts regulating the collection of income tax, and in particular of s. 30 of the Customs and Inland Revenue Act, 1890.

Income tax on Guaranteed $2\frac{3}{4}$ per cent. Stock falls to be collected under Sched. C of the Income Tax Act, 1842, and the mode of collection is as follows: Before the payment of any dividend on such stock the Bank of England makes out a list of the several owners thereof, the amount of stock owned by them respectively, and the amount of the dividend payable to them respectively. The amount of the tax payable by each owner in respect of his dividend is then calculated and assessed by two of the directors, or the Governor and one of the directors of the Bank, the Governor and Directors of the Bank being commissioners for this purpose. The Bank retains out of the dividend payable to each stockholder the amount at which he has been assessed to the tax, and pays him only the balance of such dividend. The amount retained by the Bank is forthwith credited to the account of the Commissioners of Inland Revenue, and retention by the Bank of the assessed amount is made equivalent to its payment to the stockholder.

With regard to this method of collection, it is to be observed, first, that for the assessment (which is a calculation of the amount payable and not an assessment of the income with reference to

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which such an amount is to be ascertained) the rate of tax must be first determined; and, secondly, that assessment is immediately followed by the assessed amount being retained and paid to the account of the revenue officers of the Crown. When this has been done the Crown has in fact already levied the tax, and nothing further remains to be done.

As was pointed out in *Bowles* v. *Attorney-General* (1), the income tax was originally imposed as, and was intended to be, a temporary tax only. It is still a temporary tax in the sense that it is imposed from year to year, although any expectation, originally entertained, that it would be really temporary has long since been abandoned. The fact that it was originally intended as a temporary tax led to the Acts regulating its collection being so framed as to expire (except as to arrears) at the end of each period for which it was imposed—that is to say (the tax being now imposed annually) at the end of each financial year commencing April 6. This, however, led to inconvenience whenever it was intended to reimpose the income tax for any financial year but the Act reimposing it could not be passed until some date later than April 6, for, between April 6 and the date when the Act reimposing the tax received the Royal assent, the powers of the officials employed for the collection of the tax remained in abeyance, and none of the detailed work necessary for its assessment and collection could be proceeded with.

The various provisions from time to time enacted by the Legislature to meet this inconvenience are detailed in the case I have mentioned, the provisions now in force being contained in s. 30 of the Customs and Inland Revenue Act, 1890. By this section it is provided that, in order to ensure the collection in due time of any duties of income tax which may be granted for any year commencing on April 6, all such provisions contained in any Act relating to income tax as were in force on the preceding day shall have full force and effect with respect to the duties of income tax which may be granted in the same manner as if the said duties had been actually granted by Act of Parliament and the said provisions had been applied thereto by the Act.

There can, I think, be no doubt that under this section the

(1) [1912] 1 Ch. 123.

officials charged with the collection of income tax can carry out all the preliminary work necessary for its assessment and collection, and under some of the schedules to the Act of 1842, though not possibly under Sched. C, there is a considerable amount of such preliminary work. But does this section authorize the assessment and collection of the tax before it is actually imposed by Act of Parliament? There are, in my opinion, various difficulties in answering this question in the affirmative.

As I have already pointed out, no assessment is possible unless the rate of tax is ascertained. The Attorney-General argued that the rate is fixed by the resolution of the Committee of the House of Commons for Ways and Means, but such resolution is by no means always passed before April 6, so that, even according to this argument, there might be a period after the commencement of the financial year during which no assessment could be made. Further, such a resolution, when reported to the House, might not be accepted. The matter might be recommitted and a fresh resolution passed assenting to an income tax at a different rate. Again, notwithstanding the resolution, the House might finally impose a tax at a rate less than, though not (according to its present procedure) at a rate greater than, that assented to, or might even reject the tax altogether. There is the further difficulty that if the Legislature was intending, notwithstanding the Bill of Rights, to enable the Crown to collect taxes on the authority of the Committee of Ways and Means, it would almost certainly have expressly so provided, and not left the matter to mere implications to be drawn from general words.

Another suggestion was that until the resolution of the Committee for Ways and Means, or alternatively until the Act reimposing the tax be passed, it may, by virtue of s. 30 of the Act of 1890, be assessed and collected at the rate imposed for the preceding year. This would, in effect, make the tax a permanent tax, subject only to such alterations in rate or otherwise as the Committee or Parliament might from time to time provide. To construe the section thus would be a serious matter, for not only would it altogether obviate the necessity of an Act of Parliament reimposing this tax, though such necessity is clearly recognized

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by the section itself, but it would very largely diminish the revenue for which the Crown depends on the annual assent of Parliament, and consequently the power of the House of Commons to bring financial pressure to bear on the Ministers of the Crown.

To meet these objections it was further contended that the assessment and collection contemplated by s. 30 was a provisional assessment and a provisional collection only, and that, if no Act were passed reimposing the tax, or if the Act reimposing the tax varied the rate, accounts could be adjusted between the Crown and every subject on whom the tax had been provisionally levied, any amount levied and not subsequently sanctioned by Act of Parliament being refunded by the Crown. Again it seems to me that the difficulties entailed by such a construction of the Act are insuperable. In the first place, it is impossible to determine for how long a period the subject on whom the tax has been previously levied is to remain in doubt as to his rights. Must the Act imposing the tax be passed in the existing session, if Parliament be sitting at the commencement of the financial year, or in the next session if Parliament be not then sitting; or would it be enough if it were passed in any session of the existing Parliament or in the first or any subsequent session of the next Parliament? I can find no answer to these problems.

In the next place, how can the subject enforce repayment of a tax provisionally levied on him? It was suggested he might have some remedy in the nature of a petition of right, but the money provisionally collected might very well have been already expended in meeting permanent charges on the Consolidated Fund, and, if this was so, fresh taxation might have to be imposed by Parliament as a condition precedent to the money provisionally levied being repaid. In my opinion it is impossible to suppose that the Legislature would have left all these matters in doubt. Had it intended merely a provisional levying of a tax which might never be actually imposed at all, it would at least have earmarked the money provisionally collected for return to those from whom it had been collected in the event of no Act imposing it being passed within a prescribed period.

The above considerations have led me to the conclusion that the proper interpretation to be placed upon the section is to hold that, though it keeps alive the machinery of the Income Tax Acts for the purposes of all the preliminary work necessary for the collection of any income tax which may be imposed for any financial year, it does not authorize any assessment or collection of a tax not yet imposed by Parliament. I am confirmed in this opinion by the words of the section itself. Its object was stated to be the collection "in due time" of any income tax which may be imposed in any financial year, and "due time" must, I think, mean the time when the tax becomes due and payable under the Act which actually imposes it. A tax levied before the Act imposing it is passed is not, in my opinion, collected in due time within the meaning of the section, though before such Act be passed it is possible to do much preliminary work which will facilitate and expedite the collection of the tax if and when it becomes due and payable.

I am also confirmed in this opinion by a consideration of the first section of the Income Tax Assessment Act, 1870, which is the first Act providing against the inconvenience to which I have referred. This section contains a proviso that nothing contained in the Act shall be deemed to continue the rate of income tax imposed for the preceding year, a proviso which seems fatal to the suggestion that the section authorized any assessment, for there can be no assessment till the rate of tax is ascertained, and there can be no collection without assessment. It is true that the preamble of this Act states that it is expedient that the provisions of the Income Tax Acts relating to assessment shall be applied to the tax before it is granted, but there are many provisions in the Income Tax Acts relating to assessment which can be acted upon before the rate of tax is known, though assessment itself can only take place when the rate is determined. The proviso in question appears in all the corresponding sections of subsequent Acts up to and including the Customs and Inland Revenue Act, 1874. It was dropped for the first time in the Customs and Inland Revenue Act, 1875, no doubt because it was thought (as I think it) to have been inserted per cautelam only.

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With regard to the practice of the Bank of England in making deductions from dividends in respect of a tax not yet imposed, I am of opinion that this practice can only be explained by the tacit assent of the persons from time to time entitled to such dividends. Dividends in respect of which no deduction has been made under Sched. C would, I think, have to be included in the returns made under Sched. D. This seems to me sufficiently clear from a consideration of the Act of 1842, but whatever doubt there may have been, if only the Act of 1842 had to be considered, has been set at rest by s. 14 of the Revenue Act, 1911. Sched. D entails upon the taxpayer far more annoyance and inconvenience than Sched. C. A taxpayer, therefore,—who has confidence that the House of Commons, having assented in Committee for Ways and Means to the rate of tax proposed on behalf of the Crown, will proceed without unnecessary delay with a Bill for the imposition of the tax—may not unnaturally prefer to allow the proposed tax to be deducted at the source. But it may from his point of view be an entirely different matter if he suspects, or has reason to suppose, that the Bill for actually imposing the tax will be postponed till after the consideration of other important and, it may be, contentious measures.

It was said, and I think correctly, that Parliament has itself, on more than one occasion, taken cognizance of the existence of the practice in question. This was done for the first time in the Finance Act, 1894, which granted an income tax for the financial year ending on April 5, 1895, at a rate exceeding that which prevailed for the year ending April 5, 1894. It was done in several subsequent years, when the rate of income tax was increased; and finally we have s. 14 of the Revenue Act, 1911, to which I have already referred, and the provisions of which are permanent. Taking the last-mentioned section as a type of those by which the existence of the practice is recognized, it is to be observed that it contemplates the case of dividends having been paid without deduction before the passing of the Act imposing the income tax, and provides what is to be done in that case. It makes no provision for the case of deductions from the dividends having been made before the tax is actually imposed, though it

inferentially refers to this possibility. In my opinion, if this section recognizes the legality of anything at all, it recognizes the legality of the payment of dividends without deduction for a tax not yet imposed, though such payment would be illegal if the contention of the Crown in this case were to prevail.

Further, some of the previous Acts containing provisions to the like effect have also contained a clause providing that deductions from dividends made prior to the passing of the Act imposing the tax shall be deemed to have been legal, thus throwing doubt upon rather than recognizing the legality of the practice in question. I have come to the conclusion, therefore, that the practice cannot be said to have been legalized in the manner suggested.

I need only add that my decision in this case must be taken as confined to the assessment and collection of income tax not yet imposed by Act of Parliament. I have not considered the case of Customs, as to which there may be some distinction. I propose to declare that, according to the true construction of s. 30 of the Customs and Inland Revenue Act, 1890, the Bank were not entitled on July 1, 1912, to deduct any sum in respect of income tax for the year commencing April 6, 1912, from the dividend to which upon that date the plaintiff became entitled as the owner of 65,500*l.* Guaranteed 2¾ per cent. Stock, and to order payment out of Court to the plaintiff of 52*l.* 10*s.* 8*d.* deducted by the Bank and paid into Court under my order of June 28, 1912; and the Bank must pay the plaintiff's costs of the action.

Solicitors for plaintiff: *Hasties.*

Solicitors for the Bank of England: *Freshfields.*

Solicitor instructing counsel appearing for the Crown: *Solicitor of Inland Revenue.*

F. E.

NEVILLE J. *In re* KENT COUNTY GAS LIGHT AND COKE COMPANY, LIMITED.

1912

Oct. 22, 29; *Nov.* 5.

[No. 00416 of 1906.]

Company—Liquidation—Claim against Firm of Promoters for Secret Profit—Liability of Partners—Joint and Several Liability—Distinct Contracts—Right of Double Proof—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 18.

The firm of L. & Co., in which G. and D. were the sole partners, were promoters of a company and sold to the company a business belonging to G. and D. at a large secret profit. The company went into compulsory liquidation. Both G. and D. were bankrupt. G. had no assets, but the liquidator proved against D.'s estate for a large sum as damages for breach of trust and received a dividend of 3*s.* in the pound, amounting to 2109*l.* Out of this money and other assets he was prepared to return to the preference shareholders a portion of their capital. Two preference shareholders were mere nominees of L. & Co. The liquidator claimed to retain the dividends payable to these nominees and set them off against the amount due from L. & Co. in respect of their secret profit:—

Held, that there were no distinct contracts between the firm of L. & Co. and the partners in that firm with the gas company, and that consequently r. 18 of Sched. II. to the Bankruptcy Act, 1883, did not apply; there was no right of double proof, and the liquidator, having elected to prove against the estate of one of the partners, had no right to prove against the joint estate of the firm of L. & Co., and there could be no set-off.

The Kent County Gas Light and Coke Company was incorporated on May 2, 1906, with a capital of 50,000*l.* divided into 6000 preference shares and 4000 ordinary shares, all of 5*l.* each, for the purpose of acquiring from F. C. Lawson & Co. a gas undertaking at the village of Goudhurst, in Kent. F. C. Lawson & Co., a firm in which Harry Warwick Gyde and Walter Darby were the sole partners, were the promoters of the company. On April 17, 1906, F. C. Lawson & Co. entered into an agreement with Charles Archer, as trustee for the company then intended to be formed, for the sale to the company of the gas undertaking for 21,800*l.*, to be paid 20 per cent. in cash on the adoption of the agreement, and the balance in cash or in fully-paid preference or ordinary shares at the option of the vendor.

Darby and Gyde had purchased the undertaking on March 19, 1906, for 2350*l.*

A prospectus was issued on May 10, 1906, inviting subscriptions for the whole capital, which fixed the minimum subscription on which the directors would proceed to allotment at 50 per cent. of the amount offered. The prospectus disclosed the agreement of April 17, but did not disclose that Gyde and Darby were making any profit. There were a considerable number of applications for shares, but on May 17 many of these were withdrawn, and the promoters hurriedly summoned a meeting of directors for the following day. On that day the applications received from the public, and not withdrawn, were for 1448 preference shares and 1829 ordinary shares. Burgess, a director of the company, on May 7, 1906, applied for 400 preference and 400 ordinary shares, and on May 17 Reynolds, another director, applied for 500 preference and 500 ordinary shares. The requisite number of applications being thus obtained, the directors proceeded to allotment on May 19. Burgess and Reynolds had applied for the shares allotted to them as nominees for F. C. Lawson & Co., who paid the allotment moneys, and they afterwards paid the other moneys payable on the shares out of the purchase-money paid to them by the company. Some of these shares were afterwards sold to outsiders and some were transferred for nominal considerations to clerks of F. C. Lawson & Co. At the date of the winding-up 510 ordinary and 444 preference shares stood in the name of D. A. Norris, a female clerk of the firm, and 200 preference and 200 ordinary shares remained in the name of Reynolds. It was admitted that they held those shares as mere nominees of F. C. Lawson & Co. and had no beneficial interest therein. An order for the compulsory winding up of the Kent County Gas Light and Coke Company was made on February 20, 1907. The official receiver was appointed liquidator and in examining the affairs of the company discovered the secret profit made by Gyde and Darby. Both Gyde and Darby had been adjudicated bankrupt. The liquidator had proved in the bankruptcy of Darby for 14,063*l.* profits made in breach of trust as a promoter of the company and had received a dividend of 3*s.* in the pound. Out of the moneys so

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received and the proceeds of sale of the company's undertaking the liquidator was prepared to make a return of capital at the rate of 53*s.* on each preference share, which would amount to 530*l.* on the shares in Reynolds's name and 1176*l.* on those in Norris's name.

The liquidator took out this summons for a declaration that he was entitled to retain the dividends payable to Reynolds and Norris and set them off against the balance of moneys due from F. C. Lawson & Co. or the partners therein.

Ward Coldridge and *W. F. Swords*, for the liquidator of the company. The claim of the company against the firm of F. C. Lawson & Co. is for a breach of trust. That claim arises out of a contract: *Emma Silver Mining Co.* v. *Grant* (1); and therefore the case comes within r. 18 of Sched. II. of the Bankruptcy Act, 1883, and the liquidator is entitled to a double proof against the joint estate of the firm of F. C. Lawson & Co. and the separate estates of the partners: *In re Davison* (2); *In re Parkers* (3); *In re Macfadyen.* (4) The liquidator cannot have lost his right of proof against the joint estate of the firm by proving against the separate estate of one partner. This case is stronger than those cited, for the Court is distributing a fund, and will pay nothing to any beneficiary against whom there is a claim that he is indebted to the fund, even though the claim is merely inchoate: *In re Rhodesia Goldfields, Ld.* (5) It is not disputed that Norris and Reynolds are mere nominees of F. C. Lawson & Co. and that that firm are the beneficial owners of the shares.

W. M. Cann, for the trustee in bankruptcy of Darby. The liability of a firm and the partners arising out of a contract is unquestionably joint and several, but a mere joint and several debt does not give a right of double proof. Unless the case comes within r. 18 in Sched. II. to the Bankruptcy Act, 1883, the creditor's right is only to elect against which estate he will prove: Lindley on Partnership, 8th ed. p. 868. Rule 18 only

(1) (1880) 17 Ch. D. 122.
(2) (1884) 13 Q. B. D. 50.
(3) (1887) 19 Q. B. D. 84.
(4) [1908] 2 K. B. 817.
(5) [1910] 1 Ch. 239.

applies "if a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm." In the cases cited for the liquidator, *In re Parkers* (1), *In re Macfadyen* (2), and *In re Rhodesia Goldfields, Ld.* (3), it was quite plain that there were distinct contracts. In *In re Davison* (4) the proof against the joint estate was withdrawn, so the question of double proof did not arise, but Cave J. sent back the case for further evidence that there was a separate contract. In this case there were no separate contracts; the liability was that of the firm only. In all the cases cited the debtor was liable as express trustee and his firm was liable either as agent or under an implied trust. Therefore the exception does not apply and the liquidator has only a right to elect. He has elected by proving against Darby's estate, and that election binds him, at least unless he returns the dividend: *Ex parte Adamson.* (5). The equitable principle that the Court in distributing a fund will not pay anything out of the fund to a person indebted to the fund until he has paid his debt does not apply. An executor cannot set off a debt due from a firm against legacies due to the partners: *Turner* v. *Turner.* (6)

W. F. Swords in reply. Cave J. in his judgment in *In re Parkers* (7) says that if the contract by trustees to perform their trust is joint and several it falls within r. 18.

Cur. adv. vult.

Nov. 5. NEVILLE J. F. C. Lawson & Co., in which firm Darby and Gyde were the only partners, were the vendors to the company of their business, and were also promoters. They made an undisclosed profit out of the sale to the company, being thereby guilty of a misfeasance in the nature of a breach of trust. Both Darby and Gyde are bankrupt and their estates are represented by the official receiver. The receiving orders against them were made on different dates and on different petitions. Against the

(1) 19 Q. B. D. 84.
(2) [1908] 2 K. B. 817.
(3) [1910] 1 Ch. 239.
(4) 13 Q. B. D. 50.
(5) (1878) 8 Ch. D. 807.
(6) [1911] 1 Ch. 716.
(7) 19 Q. B. D. 87.

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estate of Darby a proof by the liquidator of the company for 14,063*l.* has been admitted in respect of this misfeasance, upon which a dividend of 2109*l.* has been paid, and this with other moneys got in by the liquidator permits of a payment to the preference shareholders on account of their shares. Two of the shareholders who would participate in the dividend, Reynolds and Norris, were admittedly nominees of F. C. Lawson & Co. They have been served with the summons and do not appear. The liquidator claims to withhold payment of the dividend upon their shares until the liability of F. C. Lawson & Co. to the company is satisfied. This claim of the liquidator raises the question whether under the circumstances the indebtedness resulting from the misfeasance of the firm arises out of distinct contracts with the firm and the partners within the meaning of r. 18 in the Second Schedule to the Bankruptcy Act, 1883, so as to entitle the company to prove both against the joint and separate estates of the partners. If the liability is within r. 18, then the creditor has a right to prove against both estates, but if not, then it is said that, although the liability of the partners be joint and several, this gives the creditor only a right of election and not a right of double proof. That the liability being in respect of a breach of trust is joint and several I entertain no doubt, and if the dictum of Cave J. in *In re Parkers* (1) is correctly reported and correct, this would bring it within r. 18; but I think that that dictum is not correct. In Lindley on Partnership, 8th ed. p. 868, the learned authors say: "if a firm has been implicated in a breach of trust, the cestui que trust (who thereby acquires a right available against all the partners jointly, as well as against each of them separately) cannot prove against the joint and separate estates at the same time, but must elect against which he will prove as if he were an ordinary joint and separate creditor." And on p. 872, dealing with r. 18, Sched. II., of the Bankruptcy Act, 1883, they say: "All frauds and breaches of trust are not within this provision of the Act; but if a partner is a trustee, or stands in a fiduciary relation resting on contract to another, as e.g. the director of a company, and the moneys of that other which have come into his possession are misappropriated

(1) 19 Q. B. D. 84, 87.

by him in such circumstances as render his firm liable for such misappropriation, proof in bankruptcy is allowable both against his separate estate and against the joint estate of his firm." They cite *In re Parkers* (1) as the authority for this proposition. That decision was approved by the Court of Appeal in *In re Macfadyen* (2) and the principle applied to the case of a director who was guilty of a breach of trust in misapplying property of the company for the benefit of his firm; a proof against his separate estate being allowed as well as proof against the firm. But it is only so allowed where the several liability arises out of a distinct contract, as where an express trustee joins with other members of his firm in misapplying moneys belonging to his trust. In that case he is liable as a partner for the breach of the implied trust and as trustee for the breach of the express trust. The case appears to me distinguishable from the case of misapplication of a trust fund by a firm no member of which is an express trustee, which is the present case. It appears to me that the only breach of contract was committed by the firm when, having put themselves in a fiduciary relation to the company, they made the secret profit. In such a case I think r. 18 does not apply.

It follows, in my opinion, that the company are put to their election whether to pursue their remedies against the joint or separate estates, and that, having proved against the separate estate of one of the partners, they are precluded from proceeding against the joint estate, unless they withdraw their proof, which is impossible in the present case inasmuch as the dividends in question are in part the fruit of the proof itself.

I am of opinion, therefore, that no liability on the part of the firm now exists, and that, therefore, assuming that a liquidator is entitled to retain dividends payable to shareholders who hold their shares as bare trustees until a liability of their cestui que trust is satisfied, there is in the present case no liability on the part of F. C. Lawson & Co., whose nominees the shareholders in question are admitted to be. The claim of

(1) 19 Q. B. D. 84. (2) [1908] 2 K. B. 817.

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the liquidator therefore fails, and the summons must be dismissed, the costs of the liquidator and the official receiver to be paid and retained out of the assets of the company.

Solicitors: *Simpson, Thomas & Clark; Tarry, Sherlock & King.*

J. R. B.

C. A. 1912 *Oct.* 22, 23.

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[1912 D. 109.]

Landlord and Tenant—Lease—Covenant to Repair—Waste—Assignment of Right to Damages—Construction—Unassignability of Right to Damages for Waste—Implied Covenant by Tenant not to Commit Waste.

A right of action for damages in the nature of waste being in respect of a tort is, on grounds of public policy, not capable of assignment.

By a lease dated in 1906 certain business premises were demised to the plaintiff for a term of forty-one and a half years. The lease contained the usual covenants by the lessee to repair. The plaintiff took the lease as trustee for a company, and the company entered into occupation of the premises. On March 19, 1909, a receiver and manager of the company's property was appointed in a debenture-holders' action, and on March 25, 1909, the company went into voluntary liquidation. On May 2, 1911, the company by its liquidator and the receiver entered into an agreement with the defendant for the sale to him of the fixed plant and machinery of the business. By clause 14 of the agreement it was provided that the defendant was to be entitled to occupy the premises for the purpose of removing the plant and machinery until September 29, 1911, upon certain conditions, one of which was that he was not to do anything which if done by the lessee would be a breach of the covenants and conditions contained in the lease. It was also provided that the defendant was to make good to the satisfaction of the lessor all damages done in removing the tenant's fixtures agreed to be sold. The agreement was approved by the Court in the debenture-holders' action and the defendant was let into possession of the premises. Whilst in possession the defendant committed certain acts which were alleged to constitute waste. Upon his going out of possession on September 29, 1911, the plaintiff was let into possession, and by a deed dated November 6, 1911, the company's interest in the premises was released to the plaintiff, together with the benefit of clause 14 of the agreement of May 2, 1911, and the full power to enforce the obligations under that clause:—

Held, upon the construction of the assignment of November 6, 1911,

that it did not purport to assign to the plaintiff any right of action for tort in respect of waste, but only in respect of breaches of covenant.

Held, also, that if the assignment had purported to assign any such right the assignment would have been invalid, inasmuch as such a right is not assignable, according to the established rule which has not been changed.

Fitzroy v. *Cave* [1905] 2 K. B. 364, followed.

Dictum of Lord Esher M.R. in *Whitham* v. *Kershaw* (1885) 16 Q. B. D. 613, 616, that "There is an implied covenant on the part of the tenant not to commit waste," dissented from.

Decision of Warrington J. affirmed.

APPEAL from a decision of Warrington J.

By an indenture of lease dated November 9, 1906, a certain piece of land situate on the south-west side of Evelyn Street, Deptford, and the buildings erected thereon were demised to the plaintiff Wolf Defries for the term of forty-one and a half years less ten days from September 29, 1906, subject to the payment of the rents and the performance of the lessee's covenants and conditions therein reserved and contained.

The lease was in fact taken by the plaintiff as trustee for a company called J. Defries & Sons, Limited, and the company entered into occupation of the premises and used them for the purposes of its business, and the premises became known as the "Antelope Works."

In 1909 a debenture-holders' action was commenced against the company, and on March 19 of that year A. F. Whinney was appointed receiver and manager on behalf of the debenture-holders of all the property of the company.

On March 25, 1909, the company passed a resolution to wind up voluntarily and Whinney was appointed the liquidator.

By an agreement dated May 2, 1911, and made between the company of the first part, Whinney first as receiver and manager for the debenture-holders of the second part, secondly as liquidator of the company of the third part, and the defendant Charles Williamson Milne of the fourth part, it was agreed, subject to the approval of the agreement by the Court in the debenture-holders' action being obtained within the time therein mentioned, that the company should sell and the defendant should purchase for the consideration therein mentioned the property of the company described in the first schedule thereto, which included all

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fixed plant and machinery belonging to the company or the receiver and then upon the premises of the company known as the Antelope Works. Clause 14 of the agreement was as follows:—"The lease of the Antelope Works at Evelyn Street Deptford by which the said premises were demised to Mr. Wolf Defries for a term of forty-one and a half years less ten days computed from the 29th September 1906 is not included in the present sale but the purchaser or his assigns shall be permitted to have the use and occupation of the said premises from the completion of the purchase until the 29th day of September 1911 (subject to determination by the purchaser or his assigns on the 24th day of June 1911 by one month's previous notice in writing) but upon the condition that the purchaser shall place the receiver in funds to pay the rent or in case of the first quarterly payment an apportioned part thereof from the date of completion until the 29th day of September 1911 or the 24th day of June 1911 as the case may require and shall make all other payments falling upon the lessee under the said lease (other than repairs and painting which ought to have been done in or are attributable to the period before the date of this agreement) and also that the purchaser or his assigns shall not while in occupation of the premises do suffer or omit anything which if done suffered or omitted by the lessee would be a breach of any of the covenants or conditions contained in the said lease and on the part of the lessee to be performed or observed other than the covenant for payment of rent. The purchaser shall on quitting the said premises make good to the satisfaction of the lessor all damages done in or about the removal from the said premises of the tenant's fixtures hereby agreed to be sold and the receiver shall not be under any obligation to meet any requirements of the landlord or the local authorities."

This agreement was approved by the Court in the debenture-holders' action on May 12, 1911, and the purchase was completed on or about June 8, 1911, and thereupon the defendant was let into possession of the Antelope Works in accordance with clause 14 of the agreement, and he and his assigns remained in possession thereof until September 29, 1911.

Upon the defendant going out of possession of the Antelope

Works on September 29, 1911, the plaintiff was let into possession thereof by the receiver in accordance with an order which had been obtained by the receiver in the debenture-holders' action on September 22.

By an indenture dated November 6, 1911, and made between the company of the first part, Whinney first as receiver of the second part, and secondly as liquidator of the third part, and the plaintiff of the fourth part, the facts as above stated down to the delivery up of possession of the premises by the defendant on September 29, 1911, were recited. The deed then continued :— "And whereas the said Wolf Defries contends that the said Charles Williamson Milne has committed breaches of the obligations on his part contained in the said clause 14 of the agreement for sale and that he has refused when called upon to fulfil such obligations. And whereas the company and the receiver have agreed with the said Wolf Defries to assign to the said Wolf Defries the benefit of clause 14 of the agreement for sale in manner hereinafter provided and upon having such indemnity to the receiver as is hereinafter contained." The deed then recited that the sanction of the Court had been obtained and that "whereas the company acting by its liquidator has agreed with the said Wolf Defries to release to him all such interest as the company may have in the premises comprised in the said recited indenture of lease in manner hereinafter provided upon having such release as is hereinafter contained." Then by the first testatum the company thereby released and the liquidator released and confirmed to the plaintiff all the interest, if any, which the company and the liquidator or either of them had in the premises demised by the said indenture of lease. The second testatum was as follows :—"This indenture also witnesseth that the company acting by the receiver (*sic*) and the receiver do hereby respectively assign unto the said Wolf Defries All the benefit and advantage of the said clause 14 of the agreement for sale and the full right power and authority to enforce the obligations of the said Charles Williamson Milne under such clause To Hold the same premises unto the said Wolf Defries absolutely."

Notice in writing of this assignment was given to the defendant on November 6, 1911.

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On January 23, 1912, the plaintiff commenced the present action, claiming (1.) damages for breach by the defendant of the provisions of clause 14 of the agreement of May 2, 1911, and (2.) by way of alternative or additional relief damages for acts of waste alleged to have been committed by the defendant.

The plaintiff, by his statement of claim, alleged that upon entering into possession of the premises on September 29, 1911, he discovered that the defendant had committed breaches of the agreements on his part contained in clause 14 of the agreement of May 2, 1911. He further alleged that the defendant whilst in occupation had committed acts of wilful waste thereon and that the damages caused by such dilapidations and acts of waste amounted to the sum of 367*l.*

The defendant, by his defence, traversed the allegations in the statement of claim, and while denying all liability in respect of the matters therein alleged, paid into Court (1.) the sum of 5*l.* 17*s.* 5*d.* in respect of the alleged want of repair to the premises accrued from June 8, 1911, to September 29, 1911, and (2.) the sum of 100*l.* in respect of the alleged wilful waste done to the premises.

The action was tried before Warrington J. on May 16, 17, 21, and 22, 1912.

His Lordship held that the defendant had committed certain breaches of clause 14 of the agreement of May 2, 1911, and awarded the plaintiff by way of damages for such breaches the two sums of 5*l.* 17*s.* 5*d.* and 100*l.*, which had been paid into Court, together with the costs down to March 20, 1912, when they were paid into Court. He further held that, even assuming that a claim for damages in the nature of waste could be assigned, that the claim by the company for such damages was not, upon the true construction of the assignment of November 6, 1911, in fact assigned by it to the plaintiff.

From this judgment the plaintiff appealed so far as it decided that he was not entitled to recover damages in respect of the wilful waste.

The principal acts of wilful waste of which the plaintiff complained were the damage to a roadway running through the premises by the removal of certain iron plates or rails which had

been placed upon it for facilitating waggon traffic and damage to the brickwork of the buildings by the removal of an annealing furnace and a core oven.

H. Terrell, K.C., and *John Beaumont*, for the appellant. The appellant is entitled to sue for and recover damages for acts of waste committed by the respondent directly, either as owner of the lease or as assignee of all rights of action in respect of these acts of waste.

First, as to his right to sue directly. Formerly waste was at common law a technical term involving the relationship of tenant by the curtesy, tenant in dower, or guardian. Then, under the Statute of Marlbridge (52 Hen. 3, c. 23) and the Statute of Gloucester (6 Edw. 1, c. 5) liability for actions for waste was extended to lessees for life or for years: Bullen and Leake's Precedents of Pleadings, 6th ed. p. 506. The last-mentioned statute has been repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59). Under the present practice an action for waste will lie wherever there is privity of estate between the parties—*Cubitt* v. *Porter* (1)—or by a mortgagee against his mortgagor: *Hitchman* v. *Walton* (2); and these actions are generally described as actions for damages in the nature of waste. At law the appellant was the legal owner of the lease. He held it as trustee for the company and allowed the company to go into possession, and the possession of the company was terminated by the appointment of the receiver in the debenture-holders' action. The receiver took possession of the premises as an officer of the Court and not by virtue of any estate in him. He proceeded to let them to the respondent, who thereupon acquired a legal right to possession. The reversion of the legal interest of the respondent was in the appellant and there was no intermediate interest. The appellant can therefore sue the respondent directly. The fact that the appellant was a trustee of the premises is immaterial. The respondent as a wrong-doer cannot go behind the appellant's legal title. Even assuming that there was some intermediate estate between the appellant and the respondent still the appellant can sue. Where

(1) (1828) 8 B. & C. 257, 268. (2) (1838) 4 M. & W. 409, 413.

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property is in lease and a wrong-doer enters and commits acts of waste, the lessor can maintain an action for damages to the reversion: *Attersoll* v. *Stevens*. (1) It is clear that the appellant is liable to the original lessors for the waste committed by the respondent; and it is submitted that the latter is liable to indemnify the appellant. The appellant is therefore entitled to sue the respondent directly for waste without recourse to the liquidator. Or, again, it may be said that the appellant was at law the owner of the premises and the company, his cestui que trust, was in possession as his tenant at will. The company sub-demised the tenancy at will and handed over the premises to a tenant for a term; and that entitles the appellant to bring against the sub-tenant an action on the case in the nature of waste: Bullen and Leake's Precedents of Pleadings, 6th ed. pp. 473, 943; *Farrant* v. *Lovel*. (2) At law a cestui que trust in possession is the tenant at will of the trustee, and the respondent was the tenant at will of the company.

[COZENS-HARDY M.R. I agree as to the position of the company, but you are going a step further.]

The company parted with a portion of its equitable interest. When the respondent took possession under the sub-lease he became tenant at will of the company and entitled to possession by virtue of its equitable interest. The Court can now give equitable relief, but the relationship of tenancy at will continues.

[FARWELL L.J. Can the trustee sue his cestui que trust or any one who claims through him?]

Secondly, it is contended that even if the respondent is not directly liable to the appellant he is liable to the company under clause 14 of the agreement of May 2, 1911, which created a tenancy between him and the company; and the company has sold all its rights under it to the appellant. Either the company or the appellant must have a right of action; it cannot be that the respondent can pull down all the buildings without being liable to any one.

Under clause 14 of the agreement of May 2, 1911, two obligations were imposed on the respondent, first, to make good all

(1) (1808) 1 Taunt. 183.

(2) (1750) 3 Atk. 723.

damage done by the removal of the tenant's fixtures, and, secondly, not to do or suffer anything which would be a breach of any of the covenants in the lease. The respondent has damaged (amongst other things) the roadway, and the liquidator would have been entitled to recover from him for the liquidation the cost of repairing that roadway. The assignment to the appellant comprised all the benefit and advantage of clause 14, and this right to recover arises by virtue of the legal relationship of landlord and tenant created by the clause. The right therefore passed by the assignment to the appellant.

[COZENS-HARDY M.R. Has an action for waste ever been treated as an action for breach of an implied covenant?]

Yes, in *Whitham* v. *Kershaw*. (1) But whether the case be put on implied covenant or as arising in law from the relationship of landlord and tenant is immaterial for the present purpose. A covenant to repair does not negative an implied covenant not to commit waste: the two run together.

[COZENS-HARDY M.R. Then you do not now rely on an implied covenant? Your claim is for damages for tort?]

Yes, but there must exist the relationship of landlord and tenant. That relationship was created by clause 14 of the agreement. When once that relationship is created the Statute of Marlbridge comes in and says that a tenant must not commit waste. The benefit of clause 14 has been assigned to the appellant.

[FARWELL L.J. You cannot assign a claim for damages in respect of a tort committed before the date of the assignment. No such chose in action was ever assignable either at law or in equity: *Fitzroy* v. *Cave*. (2)]

All that that case decided was that an assignment of debts was good although the purpose of the assignee in obtaining it was not to obtain payment of the debts but to attain some ulterior object. In the present case the right to recover damages was assigned together with the property which had been damaged.

[FARWELL L.J. referred to *Prosser* v. *Edmonds*. (3)]

That case was distinguished in *Dickinson* v. *Burrell*. (4)

(1) 16 Q. B. D. 613, 616.
(2) [1905] 2 K. B. 364.
(3) (1835) 1 Y. & C. Ex. 481.
(4) (1866) L. R. 1 Eq. 337, 343.

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[FARWELL L.J. Stirling L.J. explains that case in *Dawson* v. *Great Northern and City Ry. Co.* (1)]

There is a distinction between the assignment of a mere right to litigate which is bad and an assignment of a right to litigate connected with property which is good.

[FARWELL L.J. In *Prosser* v. *Edmonds* (2) the right of action was connected with property.]

The assignment of November 6, 1911, can only be held void on the ground that it is contrary to public policy, and the views of the Court as to public policy have changed since the time when *Prosser* v. *Edmonds* (2) was decided. The assignment was not, it is submitted, contrary to public policy, its object being to enable one action to be brought instead of two.

[HAMILTON L.J. It is contrary to public policy for the Court to override a settled rule.]

There is no real distinction between assigning a right to recover damages for a tort and a right to recover damages for a past breach of contract as in *Williams* v. *Protheroe*. (3)

[HAMILTON L.J. That was the case of an assignment of a debt when recovered. The assignee could only sue the debtor in the assignor's name because a bare claim could not be assigned.]

Cave, K.C., and *W. R. Sheldon*, for the respondent, were not called upon.

FARWELL L.J. This is an appeal by the plaintiff against the judgment of Warrington J., and it raises one or two points of some nicety, which have been argued with considerable ingenuity, but which I do not think myself admit of any doubt as to their decision.

By a lease of November 9, 1906, a piece of land at Deptford was demised to the plaintiff for a term of forty-one and a half years, less ten days, from Michaelmas, 1906; the lease therefore has some thirty-five years to run. It contains various covenants with respect to the building then upon the premises. The lease was in fact taken by the plaintiff as trustee for a company. The

(1) [1905] 1 K. B. 260, 271. (2) 1 Y. & C. Ex. 481.
(3) (1829) 3 Y. & J. 129.

company entered, and, amongst other things, made a road, part of the road being paved with steel or iron plates in the nature of rails, with granite setts between them to facilitate the traffic of waggons. The company carried on its business there for some time and went into liquidation in March, 1909. In 1911 an agreement was entered into between the company and the debenture-holders and the defendant for the sale to the defendant of the fixed plant and machinery of the business, and so on, and, amongst other matters, something in the nature of a licence to occupy the premises was granted to the defendant. The lease was not included in the agreement for sale, but the purchaser or his assignees were permitted to have the use and occupation of the premises from the completion of the purchase until September 29, 1911, on certain conditions. So far as regards any direct remedy claimed in the action under the agreement the learned judge has disposed of it, and his decision on that point is not under appeal.

The subject-matter of the appeal arises in this way: The defendant upon entering into possession of the premises tore up the iron plates and removed them. This action does not relate to any question as to the plaintiff's right to the articles so removed as being landlord's fixtures; it is simply a claim in respect of what is designated waste. The case is put in this way: The plaintiff says that he was the legal owner and trustee of the premises for the company; that the defendant, claiming under the company, proceeded to commit waste, that the defendant being in possession by virtue of the right conferred on him by the plaintiff's cestui que trust was tenant at will to the lessors, and could have been sued by them for the waste which he committed. The first answer to that contention is that the defendant was not so sued; and the second is that they could not have recovered anything against him, because there was no damage to the reversion by anything that was done thirty-five years before the expiration of the lease in removing fixtures which were really tenant's fixtures, the only liability being to make good the roadway and to make a proper road afterwards, and this will be done by the plaintiff himself. But it is said that although that particular right might not have been available by reason of the absence of

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damage, yet that inasmuch as the right to the damages which the cestui que trust could have claimed is now in the present plaintiff by reason of the assignment which was afterwards made to him by the liquidator, this right relates back to his former condition as trustee for the cestui que trust, and that in order to avoid circuity of action he can now use the right of action which was vested in him as legal owner and apply it, although no damage could have accrued to him in that capacity, as a means of acquiring damages in his subsequently acquired capacity. There are several answers to that contention. The first is that these damages cannot be recovered at all except in tort. With all respect to a phrase used by Lord Esher M.R. in *Whitham* v. *Kershaw* (1), I think it is clear that the action for waste, and the action on the case in the nature of waste, are both actions for tort, and there is no question of contract at all in waste, in respect of either cause of action. It is quite clear that the other Lords Justices in *Whitham* v. *Kershaw* (1) did not regard the action as one of contract at all; and it is plain from the judgments of Jervis C.J. and Maule J. in *Marker* v. *Kenrick* (2) that waste is not an action on covenant, whether express or implied. Jervis C.J. in that case says: "I am of opinion that the plaintiff is entitled to judgment. The case of *Kinlyside* v. *Thornton* (3) decided expressly that a lessor may sue for waste in an action upon the case, although the lease contains a covenant upon which the lessor might maintain an action for the same wrong." Maule J. says: "*Kinlyside* v. *Thornton* (3) shews, that, if waste be committed, as is the case here, the lessor may maintain an action on the case for it, and that it is no answer for the lessee to say that covenant also may be maintained. That case shews that the lessor may have either remedy." There is no action available here in respect of the tortious act which was committed before this assignment. The assignment was dated November 6, 1911, after the tortious act complained of had taken place. It recites that "whereas the said Wolf Defries contends that the said Charles Williamson Milne has committed breaches of the obligations on his part contained in the said clause 14 of

(1) 16 Q. B. D. 613, 616. (2) (1853) 13 C. B. 188, 198.
(3) (1776) 2 W. Bl. 1111.

the agreement for sale (that is breach of contract) and that he has refused when called upon to fulfil such obligations," and that "whereas the company and the receiver have agreed with the said Wolf Defries to assign to the said Wolf Defries the benefit of clause 14 of the agreement for sale in manner hereinafter provided and upon having such indemnity as is hereinafter contained"; then the operative part of the deed contained an assignment of "All the benefit and advantage of the said clause 14 of the agreement for sale and the full right power and authority to enforce the obligations of the said Charles Williamson Milne under such clause to hold the same premises unto the said Wolf Defries absolutely." It is plain that that does not purport to assign any right of action for tort; it deals with breach of contract and breach of contract only.

Inasmuch, however, as the question whether such a right of action is assignable has been argued, I propose to express my opinion on it. If the deed had assigned or purported to assign this right of action for tort the assignment would have been invalid because such a right is not assignable. In my opinion the case is covered by authority. The decision of this Court in *Fitzroy* v. *Cave* (1) and the reasoning of the present Master of the Rolls, who gave a very full judgment in that case, shew that the true basis of the decision was that a chose in action for breach of contract, apart from cases where the covenant runs with the land and cases of that sort, was not assignable at all at law, but in some cases, as explained by the Master of the Rolls, was assignable in equity; but a right of action in tort was never assignable at law, and no case has been cited to us, nor do I think it is possible to find any case, where it has ever been held to be assignable in equity. *Prosser* v. *Edmonds* (2) is a direct decision to the contrary. That was a case in which the right to file a bill to set aside an assignment to an executor was claimed by the assignee of the rest of the property of the assignor, and it was held that it could not be assigned. The Lord Chief Baron says: "What is this but the purchase of a mere right to recover? It is a rule—not of our law alone, but

(1) [1905] 2 K. B. 364. (2) 1 Y. & C. Ex. 481, 497.

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of that of all countries (1), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy." That is perhaps a little widely stated, but confined as it is to the case of an action for fraud, which would have been an action in tort at common law, it is to my mind an accurate and well-founded statement. If the remedy rests in tort it is not assignable. This is stated by Stirling L.J. in his judgment in the Court of Appeal in *Dawson* v. *Great Northern and City Ry. Co.* (2): "An assignment of a mere right of litigation is bad: *Prosser* v. *Edmonds* (3); but an assignment of property is valid, even although that property may be incapable of being recovered without litigation: see *Dickinson* v. *Burrell.* (4) It was said in argument that the right which Blake purported to assign was simply a claim to damages for a wrongful act, and therefore incapable of assignment. With this contention we do not agree." Accordingly they held that it was not a mere claim for damages for a wrongful act, but was a right to enforce and to recover damages for neglecting to act on a notice to treat. The meaning of that statement is, as appears from the whole case, that if the claim had been one for damages for a wrongful act it would have been unassignable. The Court of Chancery would never have allowed its process to be used for the purpose of recovering damages for a tort. There is some force in Mr. Beaumont's able argument that we have moved a good deal since *Prosser* v. *Edmonds* (3), and that public policy is regarded as a dangerous ground on which to act. Rules against maintenance are not received now with that favour which they used to receive a century or two ago. This may well be so, but it is quite another thing to ask us to extend the law by making a new case. I think it would be exceedingly bad policy to allow a person to sell rights of action for tort which he did not care to run the risk of enforcing himself; as for example to allow a liquidator to put such rights up for auction and sell them to some one who might buy for a small sum of money the chance

(1) See Voet. Comm. ad Pandect. lib. 41, tit. 1, sect. 38.
(2) [1905] 1 K. B. 260, 271.
(3) 1 Y. & C. Ex. 481.
(4) L. R. 1 Eq. 337.

of recovering a larger sum or possibly of blackmailing. This would be a dangerous thing to do, there is no authority which would enable us to do it, and I am not in the least disposed to make a new precedent. I think the appeal fails, first, because there was no assignment of this right to damages; secondly, because if it had, the assignment would have been void as being against the law forbidding the assignment of any such right of action. I therefore think that this appeal should be dismissed.

HAMILTON L.J. I am of the same opinion. The three matters of substance upon which the appellant's argument has proceeded are the roadway, the furnaces, and the core ovens. As regards all the other matters which the defendant is said to have left in bad repair, or to have damaged, the learned judge has given the plaintiff damages which only fail to satisfy him because they happen to be the amount which was paid into Court. As regards these three matters he has, and I think rightly, refused the plaintiff any damages at all. I will assume for this purpose that the damage was in itself voluntary waste, although it appears from the description of it to have consisted in leaving unrepaired something which the defendant was under no contract to repair, after he had exercised his right to remove certain fixtures which were treated in the Court below as having been sold to him as tenant's fixtures. But the plaintiff's direct claim for damages for the condition in which the defendant had left the roadway, the furnace, and the core oven turns upon the proposition that he is entitled to recover in tort, in an action upon the case in the nature of waste, in respect of the damages which he has sustained. He may have sustained damage either by reason of his liability to the lessors or by reason of his own interest in the lease. In this case it is quite clear that he never was, prior to the assignment of November 6, 1911, anything but a bare trustee of the lease for the benefit of the company, and that the company has sustained no damage by what was done; it makes no claim and is in liquidation; and, further, the plaintiff is not proved to be under any actionable liability to his lessors. The lessors in order to sue him, also in an action on the case in the nature of waste, must shew damage to their reversion

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expectant on the determination of a term which has about thirty-five years to run. They say that anything that satisfies the plaintiff would satisfy them, and they have made no claim. These facts and the nature of the subject-matter of the complaint shew that their reversion has, in fact, suffered no damage at all. They could bring no action. The plaintiff is under no measurable liability to them, and one essential ingredient in the plaintiff's cause of action in tort fails, and fails altogether. It seems to me, therefore, that the plaintiff has no direct right of action here because he has not been damnified. His indirect claim rests upon the assignment made to him by the company subsequently to the accrual of the cause of action for damages, if any, to the company. On the construction of that assignment, and of clause 14 of the contract of sale to which it refers, I think it is quite clear that it was an assignment only of causes of action in contract; and, as we have been very frankly told, the substance of this case is for damages for the waste. Even if the company had any claim in the nature of waste against the defendant it has not assigned that to the plaintiff; and this makes it unnecessary, therefore, for me to enlarge upon the question whether, if such a cause of action for bare damages for a tort had been assigned, the assignment could have been upheld. It is clear to my mind that the rule that such an assignment cannot be sustained is so well established and has so long been settled and never, so far as I know, been departed from, that it is too late to suggest, certainly to any tribunal except the highest, that that rule can be departed from now. It would be unprofitable in me to endeavour to discuss its reasons. It is a rule, and I think we ought to follow it. I do not in the least dissent from any or all of the reasons given for it, but it is a rule which binds us, and accordingly on both grounds I think this appeal fails.

COZENS-HARDY M.R. I agree. The appeal will be dismissed with costs.

Solicitors: *Harratt & Pollock; Stibbard, Gibson & Co.*

W. I. C.

Applied. ROBINSON *v.* BAILEY. [1948] 2 All E.R. 791.

Applied. KAIN *v.* NORFOLK [1949] 1 Ch. 163

WHITE *v.* GRAND HOTEL, EASTBOURNE, LIMITED.

C A. 1912 Oct. 24, 28.

[1911 W. 2178.]

Injunction—Easement—Right of Way—Restriction—Change of Condition—Alteration of User—Increase of Burden.

A right of way granted for general purposes is not to be restricted to access to the land merely for such purposes as were reasonably required at the date of the grant; therefore a right of way for general purposes to a private dwelling-house is not affected by the house being turned into an hotel.

United Land Co. v. *Great Eastern Ry. Co.* (1875) L. R. 10 Ch. 586, followed.

Decision of Joyce J. affirmed with partial variation.

APPEAL from a decision of Joyce J.

This was an action by the owner in fee simple and his tenant of stables and mews and a private road leading from the mews to a public road called Silverdale Road at Eastbourne, against the owners of adjoining property, for an injunction to restrain them from using the private road as a carriageway for the passage of motor cars or other vehicles, and for an order that the defendants should rebuild part of a wall which had been pulled down.

The defendants' premises formerly consisted of a private dwelling-house and garden known as St. Vincent Lodge. The only passage to the plaintiffs' mews was by a lane running into Silverdale Road. In 1883 the predecessors in title of the plaintiffs and defendants (Mr. Peerless and Mr. Ford) entered into an arrangement whereby the lane was to be enlarged and Mr. Ford, the owner of St. Vincent Lodge, was to have a right of way over it and through a gateway nine feet in width into his premises, thus obtaining a means of access to Silverdale Road. There was no documentary evidence of this agreement, and the question whether there was any express restriction or limitation upon the right of way was in dispute. The defendants had recently acquired St. Vincent Lodge and made use of it in connection with the business of their hotel; a covered yard between the stable and the house being used as a garage for motor cars belonging to visitors staying at the hotel, and the drivers being lodged in St. Vincent Lodge itself. These

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drivers were in the habit of using the right of way, and the defendants altered the gateway to facilitate their passage. The plaintiffs brought this action; a good deal of evidence was adduced and several questions argued, but the only point which calls for a report is the first question, namely, whether the use of the right of way must be restricted so as no longer to enure for the benefit of the owners of St. Vincent Lodge and its stables unless the same continued to be used and occupied precisely as they were in 1883, when the agreement was made, that is to say, as a private dwelling-house. On this point Joyce J. said "a great many authorities were cited before me, not all quite consistent, but the result of the argument is that in my opinion the authorities cited at pages 90 and 91 of Theobald's Law of Land do support the proposition there stated, namely:—'Where there is an express grant of a right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant.' Then all the cases are there cited, and in my opinion that statement is correct and I think the law is so settled; in other words I hold that the defendants had an unrestricted right of way to or from the gateway nine feet wide in the new wall as erected by Ford and that nothing has happened to determine such right of way." His Lordship accordingly dismissed the action.

The plaintiffs appealed.

Hughes, K.C., and *W. E. Greaves*, for the appellants. The first point is that the right of way given in this case was a right for private purposes only and was not intended to be used for trade purposes. Where a right of way is granted by deed the extent of the right is a question of construction of the deed. But the extent of the grant must be ascertained on a verbal contract such as this by a consideration of the words and acts of the parties and the purposes for which the way was at that time intended to be used. A verbal contract between laymen would generally be settled by the legal advisers of the parties and the right would be clearly defined. In the absence of such a settled contract the Court will infer that this right of way was intended

to be restricted to private user. If this is to be treated as a right of way by prescription the extent of the right is defined by the user, and according to the evidence the user has been for a private house only. The right was limited to the requirements of the house as a private house and cannot be altered if the character of the house is changed, so as to enable the donee of the right to use the way for the business purposes of an hotel as well as for private purposes. Even if this right was given in general terms it was given with reference to a private house only and cannot be extended to suit the requirements of the house when it has become an hotel: *Allan* v. *Gomme*. (1)

[FARWELL L.J. That decision is contrary to *United Land Co.* v. *Great Eastern Ry. Co.* (2)]

It has not been overruled and it is an authority that the right to use the way is confined to the use of it as it was at the time when it was granted. (3) The law as to the extent of the right granted is stated in *Cannon* v. *Villars*. (4) The surrounding circumstances and the purposes for which it is granted must be taken into consideration. The burden of the easement must not be enlarged: *Great Western Ry. Co.* v. *Talbot* (5); *Taff Vale Ry. Co.* v. *Gordon Canning*. (6)

[FARWELL L.J. Those were only questions of accommodation works. It all goes back to the question of construction whether the right was for all purposes or for limited purposes. There is nothing to shew that if a private house is turned into a shop a right of access to it is not to continue.]

The burden must not be increased: *Henning* v. *Burnet* (7); *Wood* v. *Saunders* (8); *Williams* v. *James*. (9)

Norton, K.C., and *Sargant*, for the respondents, were not called upon to argue this point.

COZENS-HARDY M.R. This is an action in which the plaintiffs claim an injunction to restrain the defendants from using and enjoying a right of way, which I shall have more particularly to

(1) (1840) 11 Ad. & E. 759.
(2) L. R. 10 Ch. 586.
(3) 11 Ad. & E. 769, 774.
(4) (1878) 8 Ch. D. 415, 420.
(5) [1902] 2 Ch. 759.
(6) [1909] 2 Ch. 48.
(7) (1852) 8 Ex. 187.
(8) (1875) L. R. 10 Ch. 582.
(9) (1867) L. R. 2 C. P. 577.

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deal with. The plaintiffs' main point was this: they said that the right of way, which was granted under circumstances which I shall state hereafter, was limited in its nature; that it was only a right of way for what I may call domestic purposes as distinct from trade purposes; and that it was only for such use as could reasonably be expected to be in the contemplation of the parties at the time when the defendants' house, St. Vincent Lodge, was a private residence, and ought not to be altered now that St. Vincent Lodge is turned into a garage. We heard that point fully argued by counsel for the appellants and we have come to the conclusion that there is no ground for limiting the right of way in the manner suggested. It is not a right of way claimed by prescription. It is a right of way claimed under a grant, and, that being so, the only thing that the Court has to do is to construe the grant; and unless there is some limitation to be found in the grant, in the nature of the width of the road or something of that kind, full effect must be given to the grant, and we cannot consider the subsequent user as in any way sufficient to cut down the generality of the grant.

I do not propose to go into the authorities, many of which were cited to us. I think that the law is settled clearly and conclusively by the decision of the Court of Appeal in *United Land Co.* v. *Great Eastern Ry. Co.* (1) I, therefore, do not differ in any way from the view taken by Joyce J., that the right of way is not to be restricted to access to the land merely for such uses as were reasonably required at the date of the grant. So far this action, I think, fails.

[His Lordship then considered the facts of the case and held that the defendants had no right to any access except through a gate in the position of the nine-foot gate which formerly stood there, and that the plaintiffs were entitled to an injunction to restrain them from exercising a right of way through a new and wider gate recently erected.]

FARWELL L.J. said that there was no ground for restricting the right of way so far as user by horses and carts for business and private purposes was concerned, and did not otherwise refer

(1) L. R. 10 Ch. 586.

to the first point. His Lordship agreed that there was ground for restricting the actual access to the nine-foot gate originally put up.

HAMILTON L.J. I am of the same opinion, and only wish to say that *Allan* v. *Gomme* (1) is, in the very terms of the judgment at p. 772, a decision on the construction of a particular deed, which is set out in the pleadings only so far as the right of way is concerned. Furthermore, if the principle which seems to have actuated the Court in that case with regard to the construction of the words of that deed were applicable to such words as we have here, *Allan* v. *Gomme* (1) would still not be an authority for the proposition contended for. The Court there dwelt upon the right not being limited to making a deposit of wood, and said that the defendant might use the plot for depositing any articles, or use it in any way that he pleased, provided it continued open ground; and they fortified themselves by the decision in *Luttrel's Case* (2), and rested their view upon the difference between a change in the substance of the right and a change only in the quality or extent of the enjoyment. The house in the present case was used as a private dwelling-house in 1883, but with the consent of a third person it might be, as in fact it was, turned into a house which could be used for the purpose of trade. It is now used as a residence for drivers, who bring with them their motor cars, their masters lodging at the hotel; that is as a residence for persons who have vehicles with them, and instead of there being only one resident with two vehicles, as in 1883, there are many residents of a shifting character with vehicles that do not belong to them. That is the only difference, and even if *Allan* v. *Gomme* (1) applied to such words as were used here, to my mind it would not justify the contention that has been put forward.

[On the questions of fact his Lordship agreed with the other members of the Court, and on these points the order of Joyce J. was varied.]

Solicitors: *Meredith, Mills & Clark; Coward & Hawksley, Sons & Chance.*

(1) 11 Ad. & E. 759. (2) (1601) 4 Rep. 86a.

H. C. R.

EVE J.
1912
Oct. 29.

SCHWEDER *v.* WORTHING GAS LIGHT AND COKE COMPANY (No. 2).

[1911 S. 4024.]

Highway—Dedication—Gas Pipes—Power to Gas Company to break up Street—Subsoil—Ownership—"Land not dedicated to public use"—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *ss.* 6, 7—*Worthing Gas Act*, 1907 (7 *Edw.* 7, *c. lxxxix.*), *ss.* 5, 7, 39.

By s. 6 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), the undertakers were authorized to break up the soil of streets within the limits of their special Act, and to lay down pipes and other works therein for supplying gas to the inhabitants of the district.

Sect. 7 provided that nothing therein should authorize the undertakers to lay down any pipe or other works "in any land not dedicated to public use, without the consent of the owners and occupiers thereof."

The plaintiff was the owner of land on either side of a road dedicated to public use, and had bored a tunnel thereunder for his own purposes. In pursuance of their statutory powers the defendants proposed to lay gas pipes and works extending to a depth of five feet below the surface of the road on either side of the tunnel, such pipes being carried up at right angles to the tunnel, and passing over it at a depth of three inches from the surface. It was agreed that eighteen inches was the thickness of soil under the road reasonably necessary for the proper maintenance of the road. The question raised in the action was whether the soil to a greater depth than eighteen inches from the surface was "land not dedicated to public use":—

Held, that the dedication of the road to public use brought it within s. 6 of the Gasworks Clauses Act, 1847, and no part of it could, for the purposes of gas or water undertakings, be properly held to be land "not dedicated to public use" under s. 7. The proviso in that section extended only to land of which no part was dedicated to public use.

Dedication, as between the owner of the soil on the one hand and the controlling authority on the other, involves not merely the occupation by the public of the surface, but also the dedication of so much of the subjacent soil as is necessary for the proper maintenance of the surface as a road or street.

WITNESS ACTION.

The plaintiff, Paul Ernest Schweder, was the owner and occupier of land lying on both sides of a road known as Goring Lane, in the county of Sussex, leading from Goring to Worthing. This lane was within the district and under the control of the

East Preston Rural District Council. The defendants were incorporated under the Worthing Gas Act, 1868, for the purpose of making and supplying gas within the limits defined by the Act, which included the town of Worthing.

In 1907 the defendants obtained a further Act, known as the Worthing Gas Act, 1907 (7 Edw. 7, c. lxxxix.), whereby they were authorized (s. 5) to purchase by agreement certain lands described in the schedule to the Act lying to the west of the plaintiff's property, and to construct gasworks for the manufacture and storage of gas thereon, and (s. 7) to lay down gas pipes and mains and works in the parish of Goring for the purpose of connecting the said lands described in the schedule to the Act, and the works authorized to be constructed thereon, with the existing gasworks of the company in the borough of Worthing, and for the purposes of that section to exercise the power of the Gasworks Clauses Act, 1847, with respect to the breaking up of streets for the purpose of laying gas mains. This Act, with certain specified exceptions, and as amended by the Gasworks Clauses Act, 1871, was incorporated with the Worthing Gas Act, 1907.

The defendants purchased land near the plaintiff's property under the powers of their special Act. In September, 1910, the plaintiff completed the construction of a tunnel under Goring Lane as a passage way to connect the two portions of his property. In December, 1910, the defendants commenced to lay two gas mains along Goring Lane, and at the point where these mains reached the plaintiff's tunnel they, without the plaintiff's consent, broke open and laid their mains in and through a part of the roof of the tunnel.

Thereupon the plaintiff commenced an action, *Schweder* v. *Worthing Gas Light and Coke Co.* [1910 S. 3812] (1), claiming a mandatory injunction directing the defendants to remove the mains; and by the judgment in that action, dated October 31, 1911, the defendants were ordered to remove the pipes and other works, but the operation of the judgment was suspended until after November 30, 1911. A further suspension was afterwards allowed, on the defendants undertaking to give the plaintiff not less

(1) [1912] 1 Ch. 83.

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than seven clear days' notice of their intention to commence any new works over the tunnel, with a plan of the same.

On November 30, 1911, the defendants gave the plaintiff notice by letter of their intention to lay pipes over the tunnel in accordance with a plan which they furnished. This plan indicated that the pipes were intended to be carried up at right angles to the plaintiff's tunnel at the point on either side where they met it, and to pass over the top of the tunnel at a depth of three inches from the surface of the road, and that these pipes were to be encased in and supported by pillars of concrete and other materials three feet or more in thickness and extending to a depth of more than five feet downwards into the land underlying the road. The defendants had not obtained the approval of the district council to this plan. The plaintiff's contention was that his land underlying Goring Lane was not "land dedicated to public use" within the meaning of s. 7 of the Gasworks Clauses Act, 1847, except to such a reasonable distance downwards as was necessary to enable the district council to make and keep in repair a proper road sufficient for the traffic of the district, and that the works proposed to be executed by the defendants would extend into land belonging to the plaintiff and not dedicated to public use.

The writ in the action was issued on December 7, 1911, and the plaintiff claimed an injunction to restrain the defendants from laying down any pipes or other works in any land of the plaintiff's underlying or forming the subsoil of Goring Lane, and not being land dedicated to public use, or from otherwise trespassing on the land of the plaintiff.

By their defence the defendants did not admit that the plaintiff had any title to the land forming the surface of or underlying Goring Lane, and proposed to lay down pipes in exercise of their statutory powers in land dedicated to public use. There was evidence that eighteen inches of soil below the surface of the road was what was required for the support of the road for road purposes, and this was practically admitted on both sides.

P. O. Lawrence, K.C., and *Bryan Farrer*, for the plaintiff.

The point raised in this action was left open by the previous

decision in *Schweder* v. *Worthing Gas Light and Coke Co.* (1), namely, whether the defendants can lay their pipes in the subsoil below the depth which is reasonably necessary for the maintenance and support of the roadway. The subsoil below that depth is still in the possession of the plaintiff and is not dedicated to public use. There is merely a right of passage to the public to and fro over the surface of the road. Sects. 6 and 7 (2) of the Gasworks Clauses Act, 1847, upon which this question turns, hang perfectly together. Under s. 6 the company have a right to lay pipes under the road, and the question is how much of the soil thereunder can be said to have been dedicated to public use. That depends upon the nature of the road and the surrounding circumstances. Here it is only a question of a country lane, and the quantum of soil required must be measured by the amount presumed to have been dedicated to the public use as against the owner of the soil on either side of the road. If the land is not dedicated to the public use the consent of the owner must be obtained before the company can act, and the defendants are here guilty of a trespass. That is the limitation imposed by the provisions of s. 7 of the Gasworks Clauses Act, 1847. Numerous cases have arisen under this and similar Acts, but none decide this precise point in terms: *Thompson* v. *Sunderland Gas Co.* (3); *Battersea Vestry* v. *County of London and Brush Provincial Electric*

(1) [1912] 1 Ch. 83.

(2) The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), provides as follows:—

Sect. 6: "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, ... and do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

Sect. 7: "Provided always, that nothing herein shall authorize or empower the undertakers to lay down or place any pipe or other works into, through, or against any building, or in any land, not dedicated to public use, without the consent of the owners and occupiers thereof, ..."

(3) (1877) 2 Ex. D. 429.

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Lighting Co. (1); *Finchley Electric Light Co.* v. *Finchley Urban Council* (2); *Ex parte Lewis* (3); *Hadwell* v. *Righton* (4); *Tunbridge Wells Corporation* v. *Baird.* (5) In the present case the concrete bottom to support the proposed pipes will be over five feet below the surface of the road. That amount of subsoil cannot reasonably be required for the purposes of the road and belongs to the plaintiff as owner of the soil. If the defendants' contention is right, the plaintiff's tunnel could never have been built at all, and yet a mandatory injunction has already been granted to restrain the defendants from interfering with the roof of the tunnel. The plaintiff is therefore entitled to the injunction which he now asks.

Cozens-Hardy, K.C. (*Macmorran, K.C.*, with him), for the defendant company. The law laid down in the cases cited is not disputed.

The point to be decided here is what is the true meaning of the provision in s. 7 with regard to "land not dedicated to public use," and whether it applies to the circumstances of this case at all. We rely upon the statutory powers conferred by s. 6. Even if s. 7 applies, the true meaning of "dedication" is the right of the public to go over that portion or area of ground "the surface of which" has been dedicated to public use for the purpose of passage. What is really dedicated has no depth or height, or cubic extent; there is merely the right to use the surface. But our contention is that the distinction referred to in the limitation contained in s. 7 is between streets which are dedicated to public use and those which are not so dedicated. The provision in this section has nothing to do with the quantum of the soil necessary for the maintenance of a particular road. Under s. 39 of the Worthing Gas Act, 1907, there is power conferred upon the company to lay pipes in streets not dedicated to public use, and the provisions of the Gasworks Clauses Act, 1847, with respect to the breaking up of streets are to apply. If the plaintiff is right in his contention, the owner of a street not dedicated to public use is in a worse position than the owner of

(1) [1899] 1 Ch. 474.
(2) [1903] 1 Ch. 437.
(3) (1888) 21 Q. B. D. 191.
(4) [1907] 2 K. B. 345.
(5) [1896] A. C. 434.

the lower subsoil under a street which has been dedicated to public use. In the present case, if any damage has been in fact done, compensation may be payable according to the concluding words of s. 6 of the Gasworks Clauses Act, 1847. The plaintiff is not, therefore, without an appropriate remedy for any wrong which he may have suffered. Our contention is that, this road having been dedicated to public use, s. 7 does not apply to it at all. [They referred to *Marriott* v. *East Grinstead Gas and Water Co.* (1); *Normanton Gas Co.* v. *Pope & Pearson, Ld.* (2); *Bellamy* v. *Liverpool United Gas Light Co.* (3); *Taff Vale Ry. Co.* v. *Pontypridd Urban Council* (4); *Maddock* v. *Wallasey Local Board* (5); *Selby* v. *Crystal Palace District Gas Co.* (6); *Rangeley* v. *Midland Ry. Co.* (7); *Foley's Charity Trustees* v. *Dudley Corporation.* (8)]

P. O. Lawrence, K.C., in reply. To introduce the words "the surface of which has been" dedicated to public use after the word "land" in s. 7 would be to disregard the plain words of the Act.

EVE J. (after stating the facts). The plaintiff takes exception to what is proposed to be done by the defendants on the ground that it is contrary to the provisions of s. 7 of the Gasworks Clauses Act, 1847, and involves a trespass on their part upon land not dedicated to public use. The defendants on the other hand contend that the plaintiff's complaint is based on a wrong construction of that section and assert that they are contemplating nothing that is ultra vires. They submit therefore that the plaintiff has no cause of action. All the material facts are proved or admitted; it is not disputed that Goring Lane is a highway or street dedicated to public use. According to Lord Cairns L.J. in the case of *Rangeley* v. *Midland Ry. Co.* (9), that involves this much at least, "a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial

(1) [1909] 1 Ch. 70, 74.
(2) (1883) 52 L. J. (Q.B.) 629.
(3) (1904) 68 J. P. 540.
(4) (1905) 69 J. P. 351.
(5) (1886) 55 L. J. (Q.B.) 267.
(6) (1862) 31 L. J. (Ch.) 595.
(7) (1868) L. R. 3 Ch. 306.
(8) [1910] 1 K. B. 317, 322.
(9) L. R. 3 Ch. 311.

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authorities or otherwise) the obligation of repairing it." The soil of the lane is vested in the plaintiff, its control is in the hands of the East Preston Rural District Council. Dedication, however, as between the owner of the soil on the one hand, and the controlling authority on the other, involves something more than the mere occupation by the public of the surface. It involves the dedication of so much of the subjacent soil as is necessary for the proper maintenance of the surface as a road or street. How much of the subsoil is necessarily dedicated for this purpose is a matter of evidence in each case. It may be that the subsoil is of such a nature that only a very shallow stratum is required for the maintenance of the surface as a road; on the other hand it may be that the character of the subsoil renders a much thicker stratum necessary. But in this case I am not called upon to determine this question of fact, because the parties are agreed that, regard being had to the nature of the subsoil and to the class of traffic to which this road is subjected, eighteen inches is the thickness of the soil which may fairly be regarded as reasonably necessary for the maintenance of this lane as a street or road. The plaintiff does not dispute that the lane to the depth of these eighteen inches is "land dedicated to public use," but this leaves open the question whether the soil at a greater depth than eighteen inches from the surface is also land so dedicated. If the question is regarded as one having reference only to the relative positions of the owner of the soil and the road authority the answer to it must obviously be in the negative. As soon as the parties are agreed that a depth of eighteen inches is all that is required for the support of the road, any claim by the authority of a dedication of soil beyond the eighteen inches is precluded, and if the case fell to be determined upon the relative rights of the landowner and the road authority my judgment must be in favour of the plaintiff.

But the real point involved is the construction of s. 7 of the Gasworks Clauses Act, 1847, and in approaching that section the terms of the section to which it is a proviso must be borne in mind, as also must be those of the whole series of sections of which it is one. The sections I refer to are those numbered from 6 to 12 inclusive. I need not read s. 6 in extenso, because it is

conceded that what the defendants propose to do would be within the powers conferred by that section but for the proviso in s. 7 that they are not "to lay down or place any pipe or other works . . . . in any land, not dedicated to public use, without the consent of the owners and occupiers thereof." Now does that limitation on their statutory powers make it imperative that every gas or water company (for the Waterworks Clauses Act contains a similar limitation on the powers of waterworks companies) desiring to lay their pipes under a street dedicated to public use should ascertain the depth of soil necessary for the maintenance of the street as a street, and should be restricted in the laying of their pipes to the depth of soil so ascertained? That is what the plaintiff argues to be the true effect of s. 7. The defendants on the other hand argue that the Legislature was drawing a distinction between streets dedicated to public use and streets not so dedicated, and not between the upper and lower strata underlying the surface of a street dedicated to public use, and that the proviso has no reference to the quantum of soil necessary for the maintenance of this or that particular road, but operates only in the case of a road of which there has been no dedication to public use. In support of this argument Mr. Cozens-Hardy relies on the fact that in the defendant company's special Act there is a section (which I am told is a very common one) giving the company power in certain circumstances to lay pipes in a street not dedicated to public use, and he points out that if the plaintiff is right in his construction of s. 7 the owner of a street not dedicated to public use is in a much worse position than the owner of the lower stratum of soil under a street dedicated to public use. That argument is not conclusive, but it is one which I cannot disregard. The matter which really weighs with me is that although the Gasworks and Waterworks Clauses Acts have been in operation now for sixty-five years past, and although there have been dozens, I think I might almost say hundreds, of cases decided wherein the construction of this series of sections has been discussed, I cannot find a single case prior to 1909 wherein any one has even suggested the construction now sought by the plaintiff to be put upon s. 7, and when raised in the case before Swinfen Eady J. (*Marriott* v. *East Grinstead Gas and Water*

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Co. (1)) the contention was almost as quickly abandoned. These sections and the corresponding ones of the Waterworks Clauses Act have been considered time and again by many judges of great eminence and have been discussed by the most learned of counsel, but from first to last tribunals and counsel alike appear to have assumed that the question of the depth of soil dedicated by the landowner for highway purposes is one to which s. 7 has no application. That surely shews that the Courts have adopted a construction of the section more consonant with good sense and reason than the one for which the plaintiff contends, and I propose to do the same. The dedication of the road to public use brings it within s. 6, and in my opinion no part of it can for the purposes of gas and water undertakings be properly held to be land not dedicated to public use under s. 7. The proviso in that section extends only to land of which no part is dedicated to public use. The plaintiff is not entitled to the injunction he claims, and I must dismiss his action with costs.

Solicitors: *Kekewich, Smith & Kaye; John Hands, for Verrall & Sons, Worthing.*

(1) [1909] 1 Ch. 70, 74.

G. M.

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Oct. 31 ;
Nov. 1, 9.

[1911 B. 502.]

Money paid under Mistake of Fact—Right to recover—Principal and Agent—Tithe—Bankruptcy of Incumbent—Sequestration of Benefice—Tithes paid under Mistake of Fact to Sequestrator appointed by Bishop—Payment by Bishop to Trustee in Bankruptcy—Liability of Bishop to refund—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 52—*Tithe Act*, 1891 (54 & 55 *Vict. c.* 8), *s.* 1 ; *s.* 10, *sub-s.* 2.

Where tithe rent-charge was paid by the plaintiffs, under a mistake of fact, to the sequestrator of a benefice appointed by an order made by the bishop under s. 52 of the Bankruptcy Act, 1883, and was received and applied by the bishop, who had no notice of the mistake, first in providing for the spiritual needs of the benefice, and then in payment of the balance to the trustee in bankruptcy of the incumbent:—

Held, that the bishop, as between himself and the plaintiffs, was in the position of a principal, and, as such, was liable to repay the amount so received and applied by him.

Decision of Neville J. [1912] 2 Ch. 318, affirmed.

Appeal from a decision of Neville J.(1)

In the action the plaintiffs sought to recover from the defendant, the Bishop of London, certain tithe commutation rent-charge paid under a mistake of fact under the following circumstances.

A testator who died in 1887 made two wills by one of which he devised freeholds and by the other bequeathed leaseholds upon certain trusts. The plaintiffs were the present trustees of those wills. The testator held the leaseholds for a term of sixteen years under a lease granted by one Ravenor in 1879 whereby the testator covenanted to pay (inter alia) the tithe rent-charge payable in respect of the demised premises. The freeholds and leaseholds adjoined each other and were situate in the parish of Greenford in the diocese of London. An apportioned tithe rent-charge was payable to the rector of Greenford in respect of each property. The testator occupied both properties and for some years prior to his death paid the tithe rent-charge in respect of them in one sum on one demand

(1) [1912] 2 Ch. 318.

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note for one sum (being the aggregate amount of the tithe rent-charge for both properties) delivered to him from time to time by a firm of Davis & Davis, the collectors for the rector. The demand notes were headed "No. 285 &c.," sometimes only "No. 285," this number being the number on the tithe map of one parcel of the testator's freeholds. After the testator's death similar demand notes for the tithe rent-charge in one sum headed in like manner were from time to time sent in by Davis & Davis to the trustees of the testator's will, who continued to pay the same until October, 1910, in forgetfulness of the fact that the lease had determined in 1895, and under the impression that the whole of the tithe rent-charge demanded was payable in respect of the testator's freeholds.

In the meantime, in 1895, the rector of Greenford was adjudicated a bankrupt, and on June 17, 1897, the then Bishop of London, on the application of the trustee in bankruptcy under s. 52 of the Bankruptcy Act, 1883, made a sequestration order whereby, after reciting the proceedings in the bankruptcy, he appointed his secretary sequestrator of the benefice and directed him to collect and receive the tithes and emoluments of the benefice and to account to him (the bishop) for the same. Under this order the sequestrator employed Davis & Davis, as his local agents, to collect the tithes and emoluments of the benefice for the purposes of the sequestration, and, after paying thereout the stipend of the curate and other outgoings as directed by the bishop, paid over the balance to the trustee in bankruptcy. This sequestration was still in force. Neither Davis & Davis, nor the sequestrator, nor the bishop, had any knowledge of the title of the testator or of his trustees, or of the existence or determination of the lease.

The mistake as to the leaseholds was first discovered in October, 1910, and thereupon the plaintiffs, who had been appointed trustees of the testator's wills in 1906, applied to the bishop, as the person responsible for the execution of the writ of sequestration, to repay to them six years of the tithe rent-charge so by mistake demanded by and paid to the sequestrator through Davis & Davis in respect of the leaseholds, but the bishop declined to repay the same. Thereupon the plaintiffs

issued the writ in this action and claimed repayment of the sum of 197*l.* 6*s.* 11*d.* as moneys had and received by the bishop for their use, being moneys demanded from and paid by the trustees since the year 1904 under a mistake of fact by and to the sequestrator of the benefice of Greenford for tithe rent-charge in respect of lands at Greenford not occupied or owned by them.

After the commencement of the action the sequestrator, under s. 1 and s. 10, sub-s. 2, of the Tithe Act, 1891 (54 & 55 Vict. c. 8), recovered 72*l.* 1*s.* 3*d.* from Ravenor, being two years' arrears of tithe rent-charge payable by him as the owner of the lands that had been comprised in the lease, and paid over the same to the plaintiffs, thereby reducing their claim to 125*l.* 5*s.* 8*d.*

The bishop by his defence pleaded that he was not acting as a principal in collecting and receiving the tithe rent-charge, as the plaintiffs well knew, but on the contrary was acting wholly and solely as agent collecting and receiving the same for and on behalf of the trustee in bankruptcy; and that, before he (the bishop) received any notice of the mistake of fact and before the plaintiffs made any claim for repayment, he had paid over to the trustee in bankruptcy or duly accounted to him for all tithe rent-charge and other moneys received by him and his agents under the sequestration, and therefore the plaintiffs were not entitled to recover from him the moneys they claimed or any part thereof.

Neville J. held that the sequestrator appointed by the bishop was the mere agent or bailiff of the bishop, who stood in the same position as a sheriff, and that the bishop as between himself and the payers of the tithe rent-charge was a principal, and was not in the position of an agent who had paid over the money received by him before repayment was demanded. He was therefore liable to pay to the plaintiffs the 125*l.* 5*s.* 8*d.* the balance of the amount claimed by them.

From this decision the bishop appealed.

Lord R. Cecil, K.C., and *F. Phillips*, for the appellant. The money claimed by the plaintiffs has been properly applied by the bishop and it is inequitable that he should be held liable to repay it when he cannot recover it from any one else:

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Pond v. *Underwood* (1); *Sadler* v. *Evans.* (2) The foundation of the right to recover money paid under a mistake of fact is the principle that a man shall not make a profit out of the mistake of another. At any rate the bishop cannot be in a worse position than an agent who has paid away money that he has received on behalf of his principal. In *Greenway* v. *Hurd* (3) it was held that an action for money had and received would not lie against an excise officer to recover duties received by him after the Act imposing them was repealed, if he had paid them over to his superior. Assuming that the bishop is in the position of a sheriff, *Peto* v. *Blades* (4) goes to shew that a sheriff is not liable to repay money which has come into his hands by mistake and which he has paid over to a third party.

[FARWELL L.J. referred to *Moses* v. *Macferlan.* (5)

HAMILTON L.J. referred to *Holland* v. *Russell* (6) and *Newall* v. *Tomlinson.* (7)]

The test is whether the defendant in such an action received the money as a mere agent or for his own use and benefit. The plaintiff in order to succeed must shew that the defendant has either got the money or had the benefit of it. The question, it is true, generally arises in cases of principal and agent, but the agency cases are not altogether material.

[HAMILTON L.J. referred to *Durrant* v. *Ecclesiastical Commissioners for England and Wales.* (8)]

There the facts were similar to those in the present case, but the payment was to the Commissioners who were the owners of the tithe.

Upon the authorities it is submitted that where money has been paid under a mistake of fact to one who has no individual interest in it and has applied it in accordance with his duty an action for money had and received will not lie against him. The case of a trustee is different, because there in law the money is his. The action is founded on the fact that, the defendant having the money or the money's worth in his hands, it is inequitable

(1) (1705) 2 Ld. Raym. 1210.
(2) (1766) 4 Burr. 1984.
(3) (1792) 4 T. R. 553.
(4) (1814) 5 Taunt. 657.
(5) (1760) 2 Burr. 1005.
(6) (1863) 4 B. & S. 14.
(7) (1871) L. R. 6 C. P. 405.
(8) (1880) 6 Q. B. D. 234.

that he should retain it when it has been paid under a mistake of fact: *Buller* v. *Harrison* (1); *Bunter* v. *Cresswell*. (2)

When a benefice is sequestrated there is a statutory duty upon the bishop to provide for the spiritual needs of the parish by appointing a curate at a stipend to be paid by the sequestrator out of moneys coming to his hands under the sequestration: Pluralities Act, 1838 (1 & 2 Vict. c. 106), s. 99; Sequestration Act, 1871 (34 & 35 Vict. c. 45), ss. 1, 3.

[FARWELL L.J. I doubt whether the Pluralities Act applies here, because by a subsequent statute the case of bankruptcy is expressly provided for.

COZENS-HARDY M.R. referred to the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 13 et seq.]

Money spent on dilapidations is spent on behalf of the incumbent. In respect of such payment the bishop would be in the position of an agent.

The bishop's position is very like that of a sheriff, the sequestrator being his bailiff: *Harding* v. *Hall* (3); *Rex* v. *Bishop of London*. (4) We rely on the dictum of Gibbs C.J. in *Peto* v. *Blades* (5), and also on *Greenway* v. *Hurd*. (6)

[FARWELL L.J. referred to *Jones* v. *Barrett*. (7)]

It was further contended in the Court below that the continued payment of the tithe rent-charge by the plaintiffs after the lease had expired created an estoppel, but that point is not now urged. [They also referred to *Ex parte James*. (8)]

Jenkins, *K.C.*, and *Manby*, for the respondents. It must be admitted that the bishop is not an agent, because no one can say who is his principal. It is said that although he received the money as principal, yet he had no individual interest in it, and having properly applied it he ought in equity to be treated as being in the position of an agent who has paid the money over to his principal before any demand was made for repayment. But as between the plaintiffs who paid the money and the bishop who received it the latter must be regarded as a principal.

(1) (1777) 2 Cowp. 565.
(2) (1850) 14 Q. B. 825.
(3) (1842) 10 M. & W. 42.
(4) (1822) 1 Dow. & Ry. 486.
(5) 5 Taunt. 657.
(6) 4 T. R. 553.
(7) (1724) Bunbury, 192.
(8) (1874) L. R. 9 Ch. 609.

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If the appellant is right, then the decision in *Kelly* v. *Solari* (1) was wrong. That case shews that there is no such broad principle as is contended for on behalf of the appellant. See also *Durrant* v. *Ecclesiastical Commissioners for England and Wales.* (2)

There is no authority in which when money paid under a mistake is received by a person, who is not an agent, and is paid away by him, he has not been held liable to refund it. The property in the money was in the bishop as soon as he received it. In the report of *Peto* v. *Blades* (3) there is such confusion of language that it is useless as an authority for the proposition in support of which it has been cited. The plaintiffs could have no remedy against any one except the bishop. The appellant is driven to say that when once the money had left the hands of the sequestrator the plaintiffs were without remedy. An executor could not so escape liability, and the bishop or a sheriff is in no different position. It is not possible to discriminate between different classes of principals.

[FARWELL L.J. referred to *Fitzpatrick* v. *M'Glone.* (4)]

The question of principal and agent has really no application to this case. In the case of the right to recover against a principal it is immaterial that he has paid the money away. [*Standish* v. *Ross* (5) was also referred to.]

F. Phillips in reply.

Cur. adv. vult.

Nov. 9. COZENS-HARDY M.R. In this action the plaintiffs seek to recover from the Bishop of London certain sums paid to him in respect of tithe rent-charge, such payment being made under a mistake of fact, namely, that the rent-charge was payable in respect of lands in which the plaintiffs were interested, whereas in truth the liability of the plaintiffs to pay the rent-charge no longer existed. The mistake of fact and the receipt by the bishop are not now disputed. It has long been held that money paid under a mistake of fact can be recovered from the recipient,

(1) (1841) 9 M. & W. 54.
(2) 6 Q. B. D. 234.
(3) 5 Taunt. 657.
(4) [1897] 2 I. R. 542, 551.
(5) (1849) 3 Ex. 527.

but an exception has been engrafted upon the rule that, where the money was paid to a person known to be an agent for a principal and known to be receiving as such, the agent cannot be sued if he has before notice of the mistake paid it over to his principal. In *Sadler* v. *Evans* (1), where the action was brought against Lady Windsor's agent, Lord Mansfield said that the action ought to have been brought against Lady Windsor herself and not against her agent: "They" (i.e. the Court) "thought the principles upon which actions for money had and received to the plaintiff's use are founded did not apply to the circumstances of the present case. It is a liberal action, founded upon large principles of equity, where the defendant can not conscientiously hold the money. The defence is any equity that will rebut the action. This money was paid to the known agent of Lady W. He is liable to her for it; whether he has actually paid it over to her, or not: he received it for her. And Lord Mansfield expressed a dissent to the case of *Jacob* v. *Allen* (2), and his approbation of *Pond* v. *Underwood* (3), which is contrary to it. He said, he kept clear of all payments to third persons, but" (i.e. except) "where 'tis to a known agent; in which case, the action ought to be brought against the principal, unless in special cases, (as under notice or mala fide)." This passage is the foundation on which the appellant's argument is erected. In *Moses* v. *Macferlan* (4) Lord Mansfield says that an action for money had and received lies only for money which, ex æquo et bono, the defendant ought to refund. But the wide language thus used by that great judge has not been followed. For example, money paid under a mistake of law cannot be recovered, although its retention would seem to be equally against good conscience.

It is argued on behalf of the appellant that the bishop, whose precise position I shall more fully consider, ought not, within the principle thus laid down by Lord Mansfield, to be held liable in the action because he has no individual interest in the money paid and has applied it in accordance with his duty. I am unable to accede to this view. No case can be found in the books

(1) 4 Burr. 1984, 1986.
(2) (1703) 1 Salk. 27.
(3) 2 Ld. Raym. 1210, 1211.
(4) 2 Burr. 1012.

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in which a defendant has been exempted except that of an agent who has paid over to his principal. I think it is impossible for us at the present time to say that this exception ought to be extended in the manner which is desired. Not only is there no decision in favour of this view. There is not even a dictum, except that of Gibbs C.J. in *Peto* v. *Blades* (1), but that case is so badly reported that I am quite unable to satisfy myself that the alleged dictum has any bearing upon the present case. But however that may be, it is sufficient to say that there are many dicta in favour of the opposite view. I need only refer to the observations of Lord Atkinson in *Kleinwort* v. *Dunlop Rubber Co.* (2), and to the judgment of the Irish Court delivered by Palles C.B. in *Fitzpatrick* v. *M'Glone.* (3) Unless, therefore, the bishop can establish that he received this money as an agent and has paid it over to his principal, I do not think his defence can prevail.

The rector of the parish in respect of which the tithe rent-charge was payable was adjudicated a bankrupt in 1895, and under s. 52 of the Bankruptcy Act, 1883, the trustee applied for a sequestration of the profits of the benefice. On June 17, 1897, Bishop Creighton sequestered in accordance with the provisions of that section, and granted to Mr. Lee his power and authority in that behalf until the bishop should think fit to relax the same. The duties of the bishop are defined by the Sequestration Act, 1871, which must be read with ss. 13 to 20 of the Ecclesiastical Dilapidations Act, 1871. The effect is, shortly, that the money got in by the bishop under the sequestration must first be applied for securing the due performance of the spiritual duties in the parish, for which purpose not more than two-thirds of the income may at the discretion of the bishop be applied, next in satisfying any liability for dilapidations, and lastly in payment to the trustee in bankruptcy. Now in these circumstances it seems to me quite plain that there is no one who can be called a principal for whom the bishop is merely an agent. The sequestration was not issued in any Court as a means of enforcing the judgment of that Court. The bishop cannot be called upon to account on the

(1) 5 Taunt. 657. (2) (1907) 97 L. T. 263, 265.
(3) [1897] 2 I. R. 542.

footing that he is merely in the position of a sheriff executing the judgment of a Court of law.

In my opinion, the only mode in which a claim could be maintained against the bishop would have been in old days by a bill in Chancery, and would now be by an action in the Chancery Division, asking for an account of money received by him in a fiduciary character. In other words, the bishop must, for the purposes of the present argument, be treated as a trustee.

It follows that, in my opinion, both on the general ground and in view of the peculiar position of the bishop, having regard to s. 52 of the Bankruptcy Act, the plaintiffs are entitled to recover the money paid to the bishop under a mistake of fact, and that it is not a defence to say that the money so paid has been duly applied by the bishop. I may add that if the bishop is not liable, I fail to see against whom the plaintiffs could obtain any relief.

In my opinion the judgment of Neville J. was correct, and this appeal must be dismissed with costs.

FARWELL L.J. I am of opinion that Neville J.'s decision is right. The bishop under statutory powers has become sequestrator, but he remains none the less the bishop entrusted with the duty of providing for the spiritual needs of the parish and of paying over the surplus to the trustee in bankruptcy. A sequestrator is accountable only to the person who appointed him; if he were appointed by the Court he would be accountable to the Court. The position is clearly explained by Patteson J. in *Bunter* v. *Cresswell* (1): "The church being for the time in substance deprived of its minister, it is cast upon the bishop to provide for the temporary vacancy; and to enable him to do so, he is to receive the profits, not, as when he receives them in the execution of a writ from a temporal Court, as a sort of sheriff, with a liability to account to the Court for his receipts, but in virtue of his office of chief pastor, responsible to no one so long as the church is properly supplied." That was a case under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86); the present case is under the Bankruptcy Act, and the last sentence is therefore not applicable. But it is clear that the bishop cannot obtain any

(1) 14 Q. B. 825, 830.

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protection as if he were sequestrator, because he is liable to account to no one but himself. The law is stated in 2 Phillimore's Ecclesiastical Law, 2nd ed. pp. 1079 and 1080. A sequestrator appointed by the Court is accountable to that Court only, and no bill would lie against him in equity: *Williams* v. *Ivimey*. (1) A sequestrator appointed by a bishop was accountable only to the spiritual Court, and if the incumbent desiring an account was aggrieved with that Court, he could file a bill in equity against the bishop and possibly also against the sequestrator, but not against the latter alone, for an account in equity; but against the bishop as the person to whom the sequestrator was accountable no action at law for money had and received would lie. He is accountable in equity as a person who has received moneys in a fiduciary capacity, it is true, but as a principal, as between himself and the person who has paid the money. It is therefore unnecessary to consider the character in which a sequestrator or sheriff receives money or land, or the dictum of Gibbs C.J. in the ill-reported case of *Peto* v. *Blades*. (2)

The appellant's case must therefore rest on the argument founded on Lord Mansfield's reasons for the action for money had and received. He says in *Moses* v. *Macferlan* (3): "This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage

(1) (1870) 23 L. T. 100. (2) 5 Taunt. 657.
(3) 2 Burr. 1012.

taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances." Lord Mansfield thus excepts money payable merely in honour or honesty; and necessarily so, for it is clear that money paid under mistake of law cannot be recovered, the reason given being that no one can plead ignorance of the law; but this will apply equally to the recipient, who, while the plaintiff is convicted of stupidity or carelessness, will himself be convicted of dishonesty, for he has accepted and insists on keeping money that he knew was not his. When, therefore, Lord Mansfield in *Sadler* v. *Evans* (1) says "It is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action," some limitation must be placed on the generality of his words. It is further clear that the equity to which he was referring is not "an equity" in the sense in which it was used in the Court of Chancery; for there was no equity to support a bill to restrain an action of assumpsit on the ground that the money sued for had been paid in mistake and paid away by the recipient, even although the recipient was a trustee and had paid the money over to his cestui que trust; the defence, if there was one, was a legal defence; and Lord Mansfield was referring to the jus naturale of Roman law which (as I have attempted to show in *Bradford Corporation* v. *Ferrand* (2)) has had a considerable influence in moulding our common law. It is in my opinion impossible for us now to create any new doctrine of common law, and the cases shew that the defence that the defendant has parted with the money before action is confined to cases where he was an agent and has paid it over to his principal. No case has been cited to us except cases of principal and agent, and in *Fitzpatrick* v. *M'Gloin* (3) Palles C.B. treats the rule as "part of the settled law of principal and agent." Lord Atkinson's speech in *Kleinwort* v. *Dunlop Rubber Co.* (4) states the law thus: "Whatever may in fact be the true position of the defendant in an action brought to recover money paid to him under a mistake of fact, he will be liable to

(1) 4 Burr. 1986.
(2) [1902] 2 Ch. 655, 662.
(3) [1897] 2 I. R. 542, 551.
(4) 97 L. T. 265.

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refund it if it be established that he dealt as a principal with the person who paid it to him. Whether he would be liable if he dealt as agent with such a person will depend upon this, whether, before the mistake was discovered, he had paid over the money which he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund."

I am, therefore, of opinion that this appeal fails.

HAMILTON L.J. I agree. The appellant's first position is that the liability to return money paid under a mistake of fact is itself an exceptional liability, which only arises when it would be not unfair to enforce it, and that an agent's defence of the "usual protection of an agent" (*Holland* v. *Russell* (1)) is only an illustration of a wider rule. The test is whether the defendant had or could have any personal interest in the money or was entirely disinterested. No express decision can be cited as authority for this. It is rested on Lady Windsor's case, *Sadler* v. *Evans.* (2) To be sure this was itself a case of money paid under a mistake of fact to an agent who had, before claim made, paid it over to his principal, but the Court in giving judgment said that this action "is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action"; and Lord Mansfield said he "kept clear of all payments to third persons, but where 'tis to a known agent; in which case, the action ought to be brought against the principal, unless in special cases." I think that in citing dicta so largely expressed it is well to remember a saying of Sir James Mansfield in *Brisbane* v. *Dacres* (3): "It certainly is very hard upon a judge, if a rule which he generally lays down is to be taken up, and carried to its full extent. This is sometimes done by counsel, who have nothing else to rely on; but great caution ought to be used by the Court in extending such maxims to cases which the judge who uttered them never had in contemplation." In the long

(1) 4 B. & S. 14, 17.
(2) 4 Burr. 1984, 1986.
(3) (1813) 5 Taunt. 143, 162.

line of cases where such claims have been made against agents and have been met by the answer that the agent has already paid the money to his principal, such as *Buller* v. *Harrison* (1), *Cox* v. *Prentice* (2), *Holland* v. *Russell* (3), *Newall* v. *Tomlinson* (4), *Taylor* v. *Metropolitan Ry. Co.* (5), and *Kleinwort* v. *Dunlop Rubber Co.* (6), there are no expressions suggesting that the agent's case is only an instance of a wider immunity, while there are many which convey that this immunity is confined to the case of a mere agent. This consideration, coupled with the entire absence of any decision to the contrary, seems conclusive. The truth is that the language of Lord Mansfield's judgment upon the action for money had and received must be applied to other cases with great caution. He described himself as being "a great friend" to the action, and he was therefore "not for stretching, lest I should endanger it": *Weston* v. *Downes*. (7) From his language in *Moses* v. *Macferlan* (8) and *Longchamp* v. *Kenny* (9) he would seem to have favoured it quite as much because of the extreme informality of the pleadings, as because it was "governed by the true equity and conscience of the case." It is true that he says of it that the defendant may go into every equitable defence and claim every equitable allowance. So, too, Buller J. (of whose knowledge of equity Lord Thurlow spoke disrespectfully) says in *Straton* v. *Rastall* (10) that the action was extended by the Court of King's Bench "on the principle of its being considered like a bill in equity," and that "to recover money in this form of action, the party must shew that he has equity and conscience on his side, and that he could recover it in a Court of Equity." As late as 1842 the Court of Common Pleas spoke of the principle "which has been held since the time of Lord Mansfield, that where money is due ex æquo et bono, it may be recovered in an action for money had and received": *Smith* v. *Jones*. (11) But the appellant can derive little aid from such

(1) 2 Cowp. 565.
(2) (1815) 3 M. & S. 344.
(3) (1861) 1 B. & S. 424; 4 B. & S. 14.
(4) L. R. 6 C. P. 405.
(5) [1906] 2 K. B. 55.
(6) 97 L. T. 265.
(7) (1778) 1 Doug. 23.
(8) 2 Burr. 1010.
(9) (1779) 1 Doug. 137.
(10) (1788) 2 T. R. 366, 370.
(11) (1842) 1 Dowl. P. C. (N.S.) 526.

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generalities. Since then a bill for money had and received, (being money paid under a mistake of fact) has been successfully demurred to for want of equity: *Lamb* v. *Cranfield* (1); and in *Rogers* v. *Ingham* (2) James L.J. says: "The law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations." In effect, therefore, both the equitable and the legal considerations applicable to the recovery of money paid under a mistake of fact have been crystallized in the reported common law cases. The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back. To ask what course would be ex æquo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried in *Standish* v. *Ross* (3) and *Kelly* v. *Solari*. (4) Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice as between man and man."

The appellant's second position is that the bishop, truly considered, is an agent, and therefore, having disbursed these tithes, is immune as such from any claim to repay them. No case is cited to shew this, but he is described, with scant respect, as being "a sort of ecclesiastical sheriff," and it is claimed that a sheriff at any rate is not so liable. For this a dictum of Gibbs C.J. in *Peto* v. *Blades* (5) is relied on. The case is so ill reported that there is some doubt whether the defendant was the sheriff himself or only his auctioneer, but in *Morley* v. *Attenborough* (6) the case was cited by counsel (Bovill among them) as being an action against the sheriff, and Parke B.'s interlocutory observation, reported only in 18 Law J. Rep. (Exchequer), p. 150, seems to shew that he took it so to be. I cannot find the case relied on as an authority in sheriff law; it is cited in

(1) (1874) 43 L. J. (Ch.) 408.
(2) (1876) 3 Ch. D. 351, 355.
(3) 3 Ex. 527.
(4) 9 M. & W. 54.
(5) 5 Taunt. 657.
(6) (1849) 3 Ex. 500.

the books as an authority on the sale of goods (see notes to the report of it in 15 Revised Reports, 609, and Benjamin on Sale, 5th ed. p. 602). Nor can I find such exemption from liability anywhere claimed for a sheriff in books of authority. On the other hand, in *Inland* v. *Bushell* (1) Coleridge J. assumes that, in spite of having paid the money over, the sheriff will, as a matter of course, be ordered to repay the judgment debtor's assignees in an action for money had and received to their use. A sheriff is not in any true sense the judgment creditor's agent. The latter is not liable in trover for the former's wrongful seizure unless he has personally interfered: *Whitmore* v. *Greene* (2); *Notley* v. *Buck*. (3) Goods seized by the sheriff are in the custody of the law, not in the possession of the judgment creditor. Whatever analogy there may be between the sheriff and the bishop, the latter is even less an agent than the former. No answer is forthcoming to the question "Who is the bishop's principal?" His large powers of devoting the emoluments of the sequestered benefice to parochial needs make him more independent in his own sphere than the sheriff is in his. No one can tell whether the plaintiff's money went to the incumbent's trustee in bankruptcy, or to the clerk taking the spiritual charge of the parish, or to the repair of dilapidations. As Neville J. tersely put it, when the money reached the bishop it had "reached its destination."

I should add that the point as to estoppel by conduct was rightly abandoned by the appellant's counsel.

I think the appeal fails on both grounds and must be dismissed with costs.

Solicitors for appellant: *Lee, Bolton & Lee.*
Solicitor for respondents: *R. R. G. Norman.*

(1) (1836) 5 Dowl. P. C. 147. (2) (1844) 13 M. & W. 104.
(3) (1828) 8 B. & C. 160.

G. A. S.

C. A.
1912
JOYCE J.
June 24, 25.

In re EARL DE LA WARR'S COODEN BEACH SETTLED ESTATE.

[1912 D. 90.]

C. A.
Oct. 30.

Settled Land—Improvements—Conversion into Building Estate—Determination of Tenancy of Farm required for Scheme—Tenant Right—Agricultural Improvements—Compensation—Capital Money—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*iii.*), (*x.*); *s.* 25 (*xvii.*), (*xviii.*); *s.* 26.

Settled land was about to be developed as a building estate, and as a necessary preliminary to carrying out the approved scheme of improvements authorized by the Settled Land Act, 1882, it was essential to obtain vacant possession of a farm let to a yearly tenant and forming an important part of the settled land in question. The tenancy was determined by notice and compensation was awarded to the tenant in respect of tenant right and improvements not coming within the First or Second Schedules to the Agricultural Holdings Act, 1908 :—

Held, that neither under s. 21 (iii.) or (x.) nor under s. 25 of the Settled Land Act, 1882, could payment of the compensation in question be allowed out of capital moneys in the hands of the trustees; and that to allow such an expenditure out of capital moneys would be entirely inconsistent with the whole purpose and scheme of the Settled Land Acts.

Decision of Joyce J. affirmed.

This was a summons under the Settled Land Acts by Earl De La Warr, the tenant for life, for a declaration that the trustees of the settlement might be at liberty to apply capital moneys in their hands in discharge of (1.) a sum of 363*l.* 15*s.*, the amount payable to a tenant under an award for tenant right and effects and for disturbance and unexhausted improvements upon the determination of his tenancy of an agricultural holding forming part of the settled land required for development as building land, and (2.) the sum of 24*l.* 2*s.* for fees payable to the valuer who made the award.

The respondents to the summons were the trustees of the settlement and the infant tenant in tail in remainder.

From the evidence it appeared that the Cooden Beach settled estate, which was situate some three miles to the west of Bexhill-on-Sea, had become ripe for development as a building estate, and

a scheme for that purpose had been submitted to and approved by the trustees of the settlement. The scheme included works and improvements coming within s. 25 (xvii.) and (xviii.) of the Settled Land Act, 1882. In order to proceed with the scheme it was essential to determine the existing tenancy from year to year of Cooden Farm, an important part of the estate comprising the sites of some of the proposed roads and also some of the most valuable sites for building purposes. Notice was accordingly given to the tenant determining his tenancy in October, 1911. The tenant thereupon made a claim for compensation in respect of tenant right and effects upon the farm, and of disturbance and unexhausted improvements, in accordance with the custom of the country and under the provisions of the Agricultural Holdings Act, 1908. The valuers agreed the compensation at 363*l.* 15*s.*, which had been paid to the tenant by the applicant. The fees of the landlord's valuer were 24*l.* 2*s.* The compensation awarded was not in respect of any improvement specified in the First and Second Schedules to the Agricultural Holdings Act, 1908.

The scheme also comprised the construction of a golf course and club-house in connection with the development of this part of the settled land as a building estate, and expenditure of capital money for that purpose had already been sanctioned by Eve J.(1)

The present application came on for hearing before Joyce J. on June 24 and 25, 1912.

Hughes, K.C., and *C. A. Bennett*, for the applicant.
Austen-Cartmell, for the infant remainderman.
H. Burrows, for the trustees.

Joyce J. It has been thought proper, and no doubt rightly, to lay out and develop a portion or portions of Earl De La Warr's settled property as a building estate, and with a view to that it is proposed among other works, which possibly may have been to some extent completed, to do such work, or execute such improvements, as are specified in paragraphs (xvii.) and (xviii.) of

(1) [1911] W. N. 171.

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s. 25 of the Settled Land Act, 1882: paragraph (xvii.) relates to open spaces—and open spaces have been held to include a golf course—and paragraph (xviii.) relates to sewers, drains, watercourses, and so on.

The land upon which these improvements are proposed to be executed, or have been executed, or are being executed—I really do not know which—was not subject to a long lease, but was held under an agricultural tenancy from year to year, and in order to get possession of the land for the purpose of developing it as a building estate, and to get rid of the tenant, it was necessary to pay him compensation for certain agricultural improvements. The Agricultural Holdings Act, 1908, does no doubt provide that for certain kinds of improvements, for which a tenant is bound to have compensation, the necessary funds for compensating him may be paid out of capital moneys liable to be invested in land. As to others it does not so provide; and the particular things for which Earl De La Warr had to pay under the award that has been made in this case are not in my opinion, as at present advised, such improvements—what may be called improvements under the Agricultural Holdings Act—as may be paid for out of capital moneys. I rather fancy that if Earl De La Warr, having obtained possession of the land, had relet it to a new tenant he would have got payment for some of these things from the new tenant—he would have got the tenant right, and so on. But the land, instead of being let to a new tenant, is to be laid out as a building estate, and the question is, Can Earl De La Warr, or can he not, get payment or repayment out of the capital moneys liable to be invested in land under the Act of what he has had to pay the tenant? I should be quite willing to give it to him if I saw my way to it, but there are infants and other people concerned whose interests have to be protected, and this money cannot be paid out of capital unless there can be found in the Settled Land Act justification or authority to pay or repay out of capital moneys these payments that have been made to the tenant.

It has been argued before me that if the improvements which the trustees or Earl De La Warr are executing are improvements within the 25th section, then this money may be got out of

capital moneys under the 21st section, namely, under paragraph (iii.), in payment for any improvements authorized by this Act—the improvements are authorized by the Act, there is no doubt about that—or under paragraph (x.) "in payment of costs, charges and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act." Can the expense of getting possession of the land for the purpose of executing the improvements be said to be part of the cost of any improvements authorized by the Act under paragraph (iii.)? I think not. It is something preliminary, no doubt, to the improvement, and without paying which the trustees for the time being or Earl De La Warr cannot get possession of the land for the purpose of executing the improvement. Is it part of the costs, charges, and expenses of and incidental to the exercise of any of the powers or the execution of any of the provisions of the Act? I think not. It seems to me a line must be drawn somewhere. If this money can be obtained under paragraph (iii.) of s. 21, I do not see why under that paragraph you should not obtain the costs of buying out a lessee under a lease of seven, fourteen, or ninety-nine years for the purpose of executing an improvement.

The result is that, after some consideration, I do not see my way to decide to make a present,—because that is what it would come to,—of this money to Earl De La Warr. Giving a fair reading to the words of the Act, I think this expenditure,—the payment to the tenant of compensation to which he is entitled in respect of these cultivation improvements,—is neither "costs of an improvement" nor can be allowed as "costs, charges and expenses of or incidental to the exercise of any of the powers."

I therefore refuse the application.

C. A. From this decision the tenant for life appealed. The appeal was heard on October 30, 1912.

Hughes, K.C., and *C. A. Bennett*, for the appellant. The conversion of this agricultural land into building land is clearly for the benefit of the settled land and is one of the works or improvements contemplated by s. 25 (xvii.) and (xviii.) of the

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Settled Land Act, 1882, upon which capital money may be expended under s. 21 (iii.) and (x.), and we submit that the expense incurred in obtaining vacant possession of this farm as a necessary preliminary to such conversion is an "operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes" within the meaning of those words as used at the commencement of s. 25.

Those words are wide enough to cover not only the actual work of construction, but also every incidental expense. For instance, the erection of cottages under s. 25 (x.) would include architect's fees for plans, tenders, &c., and also, we submit, the making of gardens for the cottages and the cost of getting rid of a public or private right of way over the site by an order of the justices or by buying out the owner, as the case might be; it would, in short, include the clearing of the ground as a site for the authorized improvement.

Sect. 21, paragraph (iii.), empowers the expenditure of capital money "in payment for"—which is equivalent to "in payment of the cost of"—"any improvement authorized by the Act," and paragraph (x.) empowers similar expenditure in payment of costs, charges and expenses of or incidental to the exercise of any of the powers of the Act. The cost in question is a direct incident of the improvement because in order to clear the site for the benefit of the settled land it is necessary to get rid of the tenant. This is not like the case of an ordinary change of tenancy where the tenant for life gets back from the incoming tenant the compensation paid to the outgoing tenant.

[COZENS-HARDY M.R. Your proposition goes to the length of saying that if there was a tenant in possession under a seven, fourteen, or ninety-nine years lease capital money might be expended in buying up his leasehold interest if vacant possession of his holding were essential for the execution of the contemplated improvement.]

Yes, the money so spent would form part of the cost of the improvement and would enure for the benefit of the settled land.

[FARWELL L.J. All the works enumerated in paragraphs (i.) to

(xx.) of s. 25 are specific physical acts and there are no general works mentioned. Your expense in this case is antecedent to those works.]

It is as much part of the operation as procuring plans or specifications of any of the authorized works. An expenditure without which the execution of the works could not be begun is an expenditure on the work.

The provisions of the Agricultural Holdings Act, 1908, relative to the application for compensation to a tenant of capital moneys under the Settled Land Acts has no application to this case.

Austen-Cartmell, for the infant tenant in tail in remainder.

H. Burrows, for the trustees.

COZENS-HARDY M.R. We will not trouble you, Mr. Cartmell. I am so entirely satisfied with the judgment of Joyce J. that I really hesitate to add a word to it.

The case is important because I am quite satisfied that it would lead to a long series of applications of this kind if we acceded to this one. There was a scheme for developing Earl De La Warr's estate, and it included, among other things, the formation of a golf course. I take it that that is an improvement within the meaning of the Act. Part of the land was held by an agricultural tenant as a yearly tenant. Earl De La Warr gave him notice, under which he would have to go at the end of a year, and consequently there was a right on the part of the tenant to obtain from Earl De La Warr compensation for various things which I need not attempt to describe.

The scheme for improvements within the Act has been sanctioned by the trustees. No question arises as to the cost of improvements in the ordinary sense under that scheme, but it is said, "Oh, Earl De La Warr ought to have repaid to him out of capital moneys the sum which, after he had got possession of the land from the agricultural tenant, he had to pay." Under what words could that possibly be done?

Our attention has been called by Mr. Hughes to various sections, and I will just refer to them. The destination of capital trust money is to be found in s. 21, and paragraph (iii.) of that section

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authorizes its application "In payment for any improvement authorized by this Act," and—under paragraph (x.)—"In payment of costs, charges and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act."

When one comes to s. 25 one finds various improvements mentioned which for the present purpose I assume have been properly held to include a golf course. Then s. 26 says: "Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon." How can it in any fair sense of language be said that the compensation payable to the agricultural tenant holding from year to year was a proposed expenditure on the execution of the improvement? It seems to me that it would be altogether contrary to the language and the scheme of the Act to hold that applications of this kind could be granted for the payment out of capital moneys of the compensation which is payable to the outgoing tenant.

Mr. Hughes did not shrink, and I think he was right in not shrinking, from the proposition I put to him that if, for the completion of the improvements, it was desirable to buy out a tenant who might have a lease for seven, fourteen, or even ninety-nine years, the purchase-money of that lease could be paid out of capital moneys. To hold that, in my opinion, would be entirely inconsistent with the whole scheme and purpose of the Act.

I agree with the judgment of Joyce J. and for the reasons he assigned. The result is that this appeal fails.

FARWELL L.J. I agree. The Act has been in operation now for thirty years, and tenants for life have not been slow to avail themselves of it, but this is admittedly a perfectly novel application such as I have never, in my experience, heard of before, and it seems to me to be absolutely impossible.

The improvements authorized by s. 25 of the Act are "The

making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works," and so on. Those are the only works for which the trustees are authorized to expend capital money. It is said that because, before any scheme for the execution of those works can even be considered, you have to get possession of the land, therefore the expenses of getting possession of the land are part of the costs, charges, and expenses of or incidental to the making or execution of these works or operations incident thereto, and are payable out of capital moneys. In my opinion they are clearly not.

I think that this appeal should be dismissed with costs, and the judgment of Joyce J. affirmed.

HAMILTON L.J. I agree for the same reasons, and I do not wish to add anything.

Solicitors: *Bennett & Ferris; Norton, Rose, Barrington & Co.; Cope & Co.*

R. M.

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1912

Nov. 22.

METROPOLITAN GAS METERS, LIMITED *v.* BRITISH, FOREIGN AND COLONIAL AUTOMATIC LIGHT CONTROLLING COMPANY, LIMITED.

[1911 M. 820.]

Patent—Action to restrain Threats—Cross-Action for Infringement—Staying Threats Action pending Decision of Infringement Action—Costs—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 36.

In February, 1911, the plaintiffs ascertained that the defendants were issuing threats with reference to the alleged infringement of their patent. On February 14, 1911, they wrote to the defendants with reference to the threats. On March 31, 1911, they issued their writ in the present action, and on April 13, 1911, gave notice of motion for an injunction to restrain the issue of the threats. On April 21, 1911, the defendants issued their writ against the plaintiffs for infringement of their patent. On April 25, 1911, the motion in the threats action came on for hearing, and by consent the action was stayed pending the result of the action for infringement, the costs being reserved, with liberty to apply. On December 14, 1911, judgment was given in the infringement action dismissing the action, and that judgment was subsequently affirmed by the Court of Appeal. On an application by the first plaintiffs that their action might be dismissed, but without costs:—

Held, that the plaintiffs had adopted a proper course with a view of saving expense by staying their action pending the decision of the infringement action and not putting the defendants to the expense of proving that they had complied with the proviso to s. 36 of the Patents and Designs Act, 1907, and that they were therefore entitled to have their action dismissed without costs.

MOTION.

The plaintiffs and the defendants were both manufacturers and sellers of automatic street lighters.

In February, 1911, it came to the knowledge of the plaintiffs that the defendants were issuing warnings to gas companies alleging that their patents were being infringed and that they would take proceedings to restrain such alleged infringements.

On February 14, 1911, the plaintiffs wrote to the defendants with reference to these threats.

On March 31, 1911, the plaintiffs issued their writ in the present action for an injunction to restrain the defendants from

alleging by letters, circulars, advertisements, or in any other manner that automatic street lighters constructed, sold, and used by the plaintiffs were constructed in infringement of the defendants' letters patent and from threatening the plaintiffs or any other person or persons with any legal proceedings or liability in respect of any alleged infringement of any patent or patents the property of the defendants in connection with the construction, sale, and use by the plaintiffs of any of the said automatic lighters.

On April 13, 1911, the plaintiffs served upon the defendants a notice of motion in the terms of their writ for April 25, 1911.

On April 21, 1911, the defendants issued their writ against the plaintiffs for infringement of patent.

On April 25, 1911, the motion in the threats action came on before Parker J., and by consent the action was stayed pending the result of the action for infringement, the costs being reserved, with liberty to apply.

On December 14, 1911, judgment was given in the infringement action dismissing it (1), and that judgment was affirmed by the Court of Appeal on June 12, 1912. (2)

The motion in the threats action was now renewed.

J. Hunter Gray, for the motion. It is admitted that under the circumstances the threats action must now be dismissed, but it is submitted that it ought to be dismissed without costs. At the date of the issue of the writ in the threats action the plaintiffs had a good cause of action against the defendants. That cause of action was not destroyed by the defendants subsequently commencing their action for infringement in compliance with s. 36 of the Patents and Designs Act, 1907. (3) It was by reason

(1) See 29 Rep. Pat. Cas. 209.

(2) See 29 Rep. Pat. Cas. 571.

(3) By the Patents and Designs Act, 1907, s. 36, "Where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an

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of the threats action that the defendants were compelled to commence their infringement action. It would be inequitable, therefore, that the plaintiffs should have to pay the costs of the present action.

T. Terrell, K.C., for the defendants. If there was any threat at all it was not until the defendants' letter of February 27, 1911. The plaintiffs had no cause of action on March 31, 1911, when they issued their writ in the present action. The defendants commenced and prosecuted their infringement action with due diligence and have brought themselves within the proviso to s. 36: *Colley* v. *Hart*. (1) No cause of action for threats arises until a reasonable time has elapsed between the making of the threats and the issue of the writ in the infringement action. Before s. 32 of the Patents, Designs and Trade Marks Act, 1883, which is re-enacted by s. 36 of the Act of 1907, was passed a common law right of action for threats existed, but in that case the plaintiff had to prove mala fides. The right given to the plaintiffs by s. 36 is a statutory right. They cannot attack the defendants' bona fides in the infringement action. If the defendants commenced their infringement action with due diligence no cause of action arose until the defendants ceased to proceed with their action with due diligence. The only reported case in which a cross-action for threats has been dismissed without costs is *Combined Weighing and Advertising Co.* v. *Automatic Weighing Machine Co.* (2), but the facts there were very special. There is no ground in this case for depriving the defendants of their costs of this action. They have done nothing wrong. All that they have done was to bring an action for infringement which was unsuccessful. The proviso to s. 36 is satisfied if an action to test the validity of the patent is honestly and with due diligence brought against the persons threatened: *Challender* v. *Royle*. (3) There are no circumstances in this case upon which the Court can in the exercise of its judicial

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infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

(1) (1890) 44 Ch. D. 179.

(2) (1889) 42 Ch. D. 665.

(3) (1887) 36 Ch. D. 425, 437.

discretion depart from the rule that the unsuccessful party should pay the costs of the action.

J. Hunter Gray in reply. The plaintiffs acted properly, it is submitted, in the course they took when they had attained their object of forcing the defendants to bring their action for infringement, and such course constituted proper circumstances in which the Court could make no order as to costs.

WARRINGTON J. The question in this case is whether, where the plaintiff in a threats action admits that his action in the result ought to be dismissed, that dismissal may properly be without costs. The question arises under the well-known s. 36 of the Patents and Designs Act, 1907. That section enacts: [His Lordship read the section, and continued:] I think there is little doubt now that the true construction of that section is that if the proviso is satisfied, then there is not and never has been the statutory cause of action. In the present case the defendants, the patentees, certainly as early as February 27, 1911, threatened the plaintiffs in the threats action with, if not legal proceedings, at any rate with liability in respect of alleged infringement, and accordingly under the first enacting part of the section, without the proviso, the plaintiffs were entitled to commence their action. They commenced their action on March 31, 1911, and gave notice of motion for an injunction on April 13. On April 21 the defendants issued a writ for infringement. The motion came before the Court on April 25, and what then took place is of great importance. It was then arranged that the proceedings in the threats action should be stayed to abide the result of the infringement action, the costs of the threats action were reserved, and the motion stood over with liberty to apply. In taking that course both the plaintiffs and the defendants adopted a perfectly reasonable and proper course with a view of avoiding any further expense which might be incurred. The infringement action came on for trial on December 14, 1911, when judgment was given for the defendants. That judgment was afterwards affirmed in the Court of Appeal.

Now the plaintiffs in the threats action have restored the motion. They do not ask the Court to give any direction for

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bringing on the action for trial, but to dispose, in a short, speedy, and inexpensive way, of the costs of action. Although in the result it turns out that the plaintiffs have no cause of action against the defendants, and there must accordingly in the threats action be judgment for the defendants, yet the plaintiffs, by refusing or by not desiring to bring their action on for trial, which they might have done, and thereby put the defendants to the expense of proving that they commenced their action within a reasonable time so as to bring themselves within the proviso to the section, and by admitting for the purpose of the present application (but only for that purpose) that the defendants did commence their action within a reasonable time, and by asking the Court to deal with the costs of the action in this cheap and speedy manner, have in my opinion done that which entitles them to say that while their action is dismissed it ought to be dismissed without costs.

Solicitors: *Faithfull & Owen; Radford & Frankland.*

W. I. C.

SINCLAIR *v.* FELL.

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Nov. 22; *Dec.* 6.

[1912 S. 3318.]

Husband and Wife—Settlement—Covenant to settle After-acquired Property—Divorce—Decree Nisi—Wife becoming entitled to Property between Decree Nisi and Decree Absolute—Property, whether caught by Covenant.

By a marriage settlement dated in 1879, it was expressly agreed that if the wife during the then intended coverture, or her husband in her right, should at one and the same time and from the same source become entitled to any real or personal property of the value of 200*l.* or upwards the property should be settled. On January 12, 1911, a decree nisi for the dissolution of the marriage was pronounced. On January 22, 1911, the wife became entitled under her mother's will to certain funds which exceeded in value the amount mentioned in the settlement. On July 24, 1911, the decree nisi was made absolute:—

Held, that the funds fell into possession during the coverture contemplated by the settlement and were therefore bound by the covenant to settle after-acquired property.

Norman v. *Villars* (1877) 2 Ex. D. 359, and *Hulse* v. *Hulse* (1871) L. R. 2 P. & M. 259, followed.

In re Pearson's Trusts (1872) 20 W. R. 522; 26 L. T. 393, discussed but not followed.

Special Case.

By an indenture dated November 6, 1879, and made between Reginald Murray of the first part, the plaintiff (by her then name of Frances Maxwell Scott, spinster) of the second part, her father, George Scott, of the third part, and Algernon Rutter and John Buttery as trustees of the fourth part, certain stocks and securities therein mentioned were settled by the said Reginald Murray upon the trusts therein expressed, and by the same indenture it was expressly agreed that if the plaintiff during the then intended coverture, or the said Reginald Murray in her right, should at one and the same time and from the same source become seised or possessed of or entitled to any real or personal property of the value of 200*l.* sterling or upwards for any estate or interest whatsoever in possession, reversion, remainder or expectancy (except jewels or other excepted articles not material to be here stated), then and in every such case the said Reginald Murray and the plaintiff should cause such real or personal property to be vested

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in the trustees upon trusts for realization and conversion and for the application thereof as in the said settlement contained.

The marriage between the said Reginald Murray and the plaintiff was duly solemnized, and the defendants were the present trustees of the said marriage settlement.

On November 7, 1880, the plaintiff's father died, and by his will gave certain annuities to his wife, Margaret Scott, to be secured by setting aside certain sums as therein mentioned, and gave his wife a power of appointment over the sums set aside in favour of any or all of his surviving children by her.

On January 12, 1911, the said Reginald Murray obtained a decree nisi for the dissolution of his marriage with the plaintiff, which on July 24, 1911, was made absolute.

On January 22, 1911, Margaret Scott died, and by her will exercised the power of appointment given her by her late husband's will in favour of her daughters alive at her decease (including the plaintiff), and gave to the plaintiff the sum of 300 Spanish dollars (equivalent to 62*l.* 10*s.*) in restoration of a sum surrendered to her at her request out of the plaintiff's portion of a late brother's estate, and bequeathed the residue of her estate to her said daughters alive at her decease (including the plaintiff).

Margaret Scott was at the time of her decease the sole surviving trustee of the will of her late husband, and his trust funds had become inextricably mixed up with her own, but the ultimate division in both cases was the same, each of the five daughters who survived Margaret Scott being entitled to one equal fifth share. An interim division had recently been made under which there was apportioned to the plaintiff:

(A) A sum of 500*l.* on account of the plaintiff's share of the estate of her late father under the power of appointment exercised by the plaintiff's mother by her will and her share of her mother's residuary estate, and

(B) A sum of 62*l.* 10*s.*, a legacy to the plaintiff given by her mother's will.

For the purposes of the special case it was agreed that the share of the plaintiff in the estate of her late father exceeded the sum of 200*l.* in value, and that her share in the estate of her late mother also exceeded in value the sum of 200*l.*

The plaintiff claimed the moneys coming to her under her mother's will or by virtue of the appointment thereby made as her own separate property. The defendants, as trustees of the marriage settlement, claimed that those funds were caught by the covenant to settle after-acquired property therein contained.

The question for the opinion of the Court was whether the covenant to settle after-acquired property in the marriage settlement contained affected any and what parts of the property coming to the plaintiff on the death of her mother, or whether any and what part of such moneys was free from the operation of such covenant.

Ashton Cross, for the plaintiff. The property coming to the plaintiff after the date of the decree nisi is not caught by the covenant to settle after-acquired property. The decree absolute takes effect as from the date of the decree nisi, and all that is done in the interval is subject to the danger of being set aside by the decree becoming absolute: *Prole* v. *Soady* (1), approved of in *Hulse* v. *Hulse*. (2) The coverture contemplated by the settlement must therefore by reason of the relation back of the decree absolute be deemed to have ceased on the date when the decree nisi was made, which was prior to the date on which the plaintiff became entitled to the property in question.

[He was stopped.]

C. L. Coote, for the defendants. There was here a contract between the husband and wife contained in the marriage settlement as to what was to happen with regard to the property to which the wife became entitled during the then intended coverture. On January 22, 1911, when the property fell into possession, the plaintiff was under the coverture contemplated by the settlement. The status of a married woman is not affected during the interval between the decree nisi and the decree absolute: *Prole* v. *Soady* (1); *Norman* v. *Villars*. (3) This is a case of contract entered into before the marriage and differs in that respect from *Prole* v. *Soady*. (1) At the date when the

(1) (1868) L. R. 3 Ch. 220. (2) L. R. 2 P. & M. 259, 262.
(3) 2 Ex. D. 359, 363.

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property fell into possession the plaintiff was under the coverture of her husband, Reginald Murray. The present case depends upon the meaning to be given to the words "during the said intended coverture" in the settlement. Those words ought, it is submitted, to receive their ordinary meaning, namely, during the actual period of the coverture, apart altogether from any question of relation back to the date of the order nisi. Adultery during the interval between the decree nisi and the decree absolute is treated as adultery during the marriage: *Hulse* v. *Hulse*. (1) [He also referred to *Stanhope* v. *Stanhope*. (2)]

Ashton Cross in reply. It is contended that this is a case of contract, but *Allcard* v. *Walker* (3) shews that on the making of a decree nisi the contract to settle after-acquired property is gone because the husband can no longer perform his part of it. The party against whom a decree nisi is pronounced can apply to have it rescinded if the party in whose favour it is pronounced will not go on with the proceedings. It is admitted that *Prole* v. *Soady* (4) does not decide that the status of a married woman is affected by the pronouncing of a decree nisi for the dissolution of the marriage; for example, she cannot remarry or get rid of a restraint on anticipation during the interval between the date of the decree nisi and the date of the decree absolute. But the question in the present case is whether the coverture subsists for the purpose of catching a particular gift under a particular settlement, and it is submitted that it does not. The Court is not here dealing with status, but with property.

WARRINGTON J. By an indenture dated November 6, 1879, being a settlement executed on the marriage then intended and afterwards solemnized between the plaintiff and Reginald Murray, the plaintiff covenanted that if she should during her then intended coverture or her husband in her right should at one and the same time and from the same source become seised or possessed of or entitled to any real or personal property of the value of 200*l.* sterling or upwards the property should be settled. On January 22, 1911, the plaintiff by the death of her

(1) L. R. 2 P. & M. 259, 261, 262.
(2) (1886) 11 P. D. 103, 108.
(3) [1896] 2 Ch. 369, 384.
(4) L. R. 3 Ch. 220.

mother became entitled to property exceeding the value mentioned in the settlement. The question I have to determine is whether that event happened during the coverture contemplated by the settlement. The facts with reference to the coverture are these. On January 12, that is to say, ten days before the important date, a decree nisi for the dissolution of the marriage between the parties was pronounced, and a decree absolute was made on July 24, 1911. Did the coverture referred to in the settlement as the then intended coverture continue till July 24, 1911, or did it cease on January 12, 1911? That of course turns on the question as to what is the effect of a decree nisi when it is afterwards made absolute. Does it determine the coverture at once or does the coverture subsist until the decree is made absolute? It is conceded that for some purposes it exists until the decree is made absolute. The parties remain husband and wife. If one of them commits a matrimonial offence between the date of the decree nisi and the date of the decree absolute that is notwithstanding the decree nisi a matrimonial offence. Again, if before the Married Women's Property Act, 1870, a wife was sued between the date of the decree nisi and the date of the decree absolute she was entitled to rely on the plea that she was a married woman. Between the dates of the two decrees the spouses cannot remarry other persons. It is obvious, therefore, that for some reasons and for some purposes the decree nisi does not dissolve the marriage from its date even although it be afterwards made absolute.

The question with regard to the status of married women between the dates of the two decrees has been discussed in two cases. The first is *Hulse* v. *Hulse*. (1) The question in that case was whether the Queen's Proctor had shewn sufficient cause why the decree nisi should not be made absolute. The cause shewn was that the petitioner had committed an act since the date of the decree nisi which, if the coverture continued, would be a matrimonial offence and prevent him from obtaining a decree absolute. It was decided that the Queen's Proctor was entitled to succeed. The Judge Ordinary said: "If, indeed, the argument could have been sustained, that the decree nisi puts an

(1) L. R. 2 P. & M. 259.

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end to the marriage, there could be no adultery during the marriage after it. But there is no warrant, I think, for that proposition; as the marriage remains undissolved until the decree absolute is pronounced, the obligations of marriage in respect of adultery equally remain, and no reasonable ground can be assigned why the breach of those obligations should be fatal before the decree nisi, but innocent after it."

The second of the two cases is *Norman* v. *Villars*. (1) In that case a married woman had commenced an action against the defendant for taking her goods. The defendant's plea was that the coverture of the plaintiff existed at the time of the alleged taking. The facts were that the decree nisi was made before the alleged taking and the decree absolute was pronounced after the plea but before the trial of the action, and it was held that the plea was proved. At the date of the act complained of the plaintiff was a married woman, and the defendant was entitled to succeed notwithstanding that before the trial the plaintiff had ceased to be a married woman. I will deal with Lord Cairns' judgment presently. He agrees with the other members of the Court that the decree nisi did not affect the status of the married woman. Baggallay L.J. concurred. Brett L.J. gave a rather more elaborate judgment. He said (2): "The question here depends upon what was the effect of the decree nisi, which was still running at the date of the plea. It was argued that the decree nisi by itself gave the wife the rights of a feme sole. I am however of opinion that that is not the case. In the first Divorce Act (20 & 21 Vict. c. 85) there was but one decree, absolute in the first instance, upon the pronouncing of which decree the wife at once acquired all the rights of a feme sole (with the one exception of re-marriage within the period limited for appeal). These rights, however, were not given by the Act, but arose as common law rights upon the change of the status. Afterwards the Legislature, thinking it too abrupt a course to dissolve the marriage by a single decree, by 23 & 24 Vict. c. 144, altered the procedure, and substituted two decrees, one nisi, the other absolute. But the two decrees together are substituted for the single decree under the former Act, not the decree nisi alone.

(1) 2 Ex. D. 359. (2) 2 Ex. D. 364.

The form of the decree is this 'that the marriage be dissolved unless cause be shewn'—not why it should be set aside—but 'why it should not be made absolute.' Until the decree is made absolute therefore there is no decree at all. On this point I think the case of *Hulse* v. *Hulse* (1) is decisive. But it was urged that when once the decree was made absolute there is a relation back of the dissolution to the date of the decree nisi, and therefore that as here the decree was made absolute before the trial the plaintiff ought to be considered as having been a feme sole at the time of the grievances committed and action brought. But I do not think that there is any relation back in that sense. There are obvious reasons for holding, as was held in the case of *Prole* v. *Soady* (2), that the decree when made absolute relates back so as to avoid any act done by the husband in the interval, for the purpose of reducing the wife's choses in action into possession; but I do not think it relates back so as to alter the wife's status in that interval, or that the above case is any authority for such a proposition."

It appears to me that on those two cases, if there were nothing else to cause me to come to a different conclusion, I should be compelled to hold in the present case that the coverture was continuing on January 22, 1911. The plaintiff was a feme covert; the two spouses were husband and wife; and so far as the status is concerned it remained unchanged. The coverture therefore continued and it was impossible to get rid of it.

But then it is said that Lord Cairns L.J. expressed a contrary opinion in *Prole* v. *Soady*. (2) In that case a married woman was entitled to a fund in Court. She and her husband had purported to mortgage that fund, and the fund had been carried over to the joint account of the husband and wife and a stop put upon it in favour of the mortgagee. On June 27, 1867, a decree nisi was pronounced for the dissolution of the marriage. On November 15, 1867, on the petition of the mortgagee, Stuart V.-C., in the presence of the husband and wife, made an order for payment out of the fund in Court of the mortgage debt due to the petitioner. On January 14, 1868, the decree nisi was made

(1) L. R. 2 P. & M. 259. (2) L. R. 3 Ch. 220.

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absolute, and the wife appealed from the order of Stuart V.-C. The matter came before Lord Cairns, sitting alone as Lord Justice, and he reversed the order of the Vice-Chancellor. In reversing that order he first of all dealt with the question whether reduction of the wife's fund into possession by the husband was necessary and came to the conclusion that it was. He then continued (1): "It was, however, contended by the counsel for the petitioner that there had been in this case a reduction into possession; and they endeavoured to shew this in two ways. First, it was said that the carrying over the fund to the joint account of the husband and wife was a reduction into possession on the part of the husband. My decided opinion is that it had no such effect, and that its effect was simply to leave the money subject to any rights which the husband and wife might have over it. It did not in any way affect the possession of the fund. Secondly, it was said that the decree nisi for the dissolution of the marriage having been made on the 27th of June, 1867, and the rule absolute not being made till the 14th of January, 1868, the parties had in the interval a locus pœnitentiæ, and that the incumbrancer availed himself of this interval to obtain the order now appealed from, which was a reduction into possession to the extent of his incumbrance." It is important to bear in mind the way in which Lord Cairns put the question he had to determine. It was whether the incumbrancer was to be allowed to obtain an order amounting to a reduction into possession. He continued: "I am of opinion that, according to the Act, it is impossible to hold otherwise than that the order nisi is the decree which the Court eventually makes absolute against the parties. Therefore I think the order absolute in this case took effect from the date of the order nisi, namely, from the 27th of June, 1867, and that everything done in the interval was subject to the danger of being set aside by the order becoming absolute." Of course if you read those words by themselves and omit the words "in this case" they do amount to a general expression of opinion that the order absolute takes effect from the date of the decree nisi. But fortunately Lord Cairns himself in *Norman* v. *Villars* (2) explains what he meant by that expression

(1) L. R. 3 Ch. 224. (2) 2 Ex. D. 359, 363.

of opinion. *Prole* v. *Soady* (1) was naturally much relied on in *Norman* v. *Villars*. (2) Lord Cairns L.C., after expressing his opinion on the facts of the case before him, proceeded to deal with the authorities, and referring to *Prole* v. *Soady* (1) said: "I do not think that that case affords any support to it" (i.e., the plaintiff's contention), "for I am utterly unable to see that it has any real bearing on the question of status." Then he quoted the observations to which I have already referred, and continued: "And I am of opinion that those observations were correct with reference to the case with which the Court then had to deal. It was not there intended to lay down as a broad rule that in all cases, and for all purposes, the decree, upon being made absolute, relates back to the date of the order nisi. So to construe the above observations is to overlook the important qualifying words 'in this case'; they must be construed with reference to the particular subject-matter then before the Court. There the question was whether a husband or his assignee could reduce into possession a fund standing in Court to the wife's credit after a decree nisi had been pronounced for the dissolution of the marriage. It is one thing for a Court of Equity to refuse to allow a husband, after a decree nisi has been pronounced, to reduce his wife's choses in action into possession, and thereby defeat her right of survivorship; it is quite another thing to say that the decree nisi alters the status of the parties."

I am of opinion that the question of status was settled by *Norman* v. *Villars* (2) and *Hulse* v. *Hulse*. (3) I hold therefore that these funds did come into possession during the coverture and so were affected by the covenant.

There is a subsidiary point. The covenant is to settle what the plaintiff or her husband in her right should at one and the same time and from the same source become entitled to. The question is whether she became entitled to the sum of 62*l*. 10*s*. at one and the same time and from the same source as the other property which I have held to be bound by the covenant. The facts as to this sum are these. By her will the plaintiff's mother executed a certain power of appointment in favour of the plaintiff

(1) L. R. 3 Ch. 220. (2) 2 Ex. D. 359.
(3) L. R. 2 P. & M. 259

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and gave to her a legacy of 62*l.* 10*s.* in restoration of a sum surrendered to her at her request out of the plaintiff's portion of a late brother's estate and bequeathed the residue of her estate to her daughters alive at her decease, including the plaintiff. She, therefore, so far as material, by the same will gives the legacy to the daughter and a share of her residuary estate. It seems to me that those benefits come at one and the same time and from the same source. The time was the death of the mother and the source was her bounty.

Dec. 6. Shortly after the above decision, and before the order embodying it was drawn up, the attention of counsel was called to *In re Pearson's Trusts* (1), which had not been cited to the Court, in which Wickens V.-C. upon similar facts had come to an opposite conclusion to that arrived at by Warrington J. The case was therefore, by consent, restored to the paper for re-argument.

Ashton Cross, for the plaintiff. *In re Pearson's Trusts* (1) was a clear decision by a Court of co-ordinate jurisdiction that in a case like the present the property is not bound by the covenant to settle after-acquired property. The proper course is, it is submitted, for the Court to follow that decision without expressing any opinion upon it. The case is referred to as law in Wurtzburg on After-acquired Property, p. 81, and Vaizey on Settlements, vol. i. p. 247.

C. L. Coote, for the defendants. In *In re Pearson's Trusts* (1) no question was raised as to *Prole* v. *Soady*. (2) In the report in the *Weekly Reporter* the case is stated to have been taken as unopposed. The Court is, it is submitted, entitled to disregard it and to act upon *Norman* v. *Villars* (3) as interpreting *Prole* v. *Soady*. (2) No reference is made to *In re Pearson's Trusts* (1) in Norton on Deeds, in Key & Elphinstone's Precedents in Conveyancing, 9th ed., or in Encyclopædia of Forms and Precedents, vol. xiii. (Settlements).

Ashton Cross in reply.

(1) 20 W. R. 522; 26 L. T. 393. (2) L. R. 3 Ch. 220.
(3) 2 Ex. D. 359.

WARRINGTON J. When this question came before me on November 22 the case was very fully argued and all the authorities then known to counsel were put before the Court. On consideration of those authorities I came to the conclusion—relying principally on *Norman* v. *Villars* (1)—that the status of coverture continued until the order absolute for dissolution of the marriage, and did not terminate with the making of the decree nisi. The concrete question was whether the interest to which the wife became entitled between the dates of the two decrees came to her during the coverture, and I decided that it did. Now since the argument before me on that day counsel have discovered that in a case of *In re Pearson's Trusts* (2) Wickens V.-C. decided the precise point in a contrary sense. He held that a sum of money to which the wife had become entitled between the dates of the two decrees was not bound by the covenant to settle after-acquired property. Now, of course, my attention being called to the decision of a judge of co-ordinate jurisdiction with myself on precisely the same point, I should in an ordinary case consider it my duty, without expressing my own view, to follow and adopt that decision; but I do not think I am quite in a position to do that on this occasion. The proceedings in which the order of Wickens V.-C. in that case was made were on petition. The report in the *Weekly Reporter* states that the petition was taken as unopposed. Counsel for the petitioner referred only to *Prole* v. *Soady* (3), a decision of Lord Cairns. Counsel for the respondent made no remark about that decision and obviously accepted it as deciding the point before the Court; for according to the report he did nothing in opposition to the prayer of the petition except to mention a circumstance which he relied on as bringing the fund within the settlement by something done by the wife after the decree nisi had been pronounced. The learned judge had nothing but that authority before him, and no suggestion was made that that authority was not conclusive; and he treated it as conclusive and on that footing made the order. But in the subsequent case of *Norman* v.

(1) 2 Ex. D. 359. (2) 20 W. R. 522; 26 L. T. 393
(3) L. R. 3 Ch. 220.

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Villars (1) Lord Cairns, sitting as a member of the Court of Appeal, himself pointed out that *Prole* v. *Soady* (2) had nothing to do with the question of status, and did not decide that the woman in question ceased to be a feme covert on the pronouncing of the decree nisi. On the contrary he decided in common with the other members of the Court that the status of coverture continued till the decree was made absolute. I felt myself bound on the previous occasion to follow that decision of the Court of Appeal, and I think I must do so now notwithstanding the decision of Wickens V.-C. to which my attention has been called. If necessary my doing so could be put on the ground that the decision of Wickens V.-C. in *In re Pearson's Trusts* (3) was in effect overruled by the subsequent case of *Norman* v. *Villars*. (1) I think, therefore, that I must adhere to the decision I pronounced the other day.

Solicitors: *Coburn & Co.; Carleton Holmes, Fell & Wade.*

(1) 2 Ex. D. 359. (2) L. R. 3 Ch. 220.
(3) 20 W. R. 522; 26 L. T. 393.

W. I. C.

In re VICTORIA SOCIETY, KNOTTINGLEY.

NEVILLE J

1912

Nov. 26.

[No. 00404 of 1912.]

Company—Winding-up—Unregistered Company—Friendly Society not registered under the Friendly Societies Acts—Jurisdiction—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 267, 268.

The Court has jurisdiction to wind up under the Companies Acts as an unregistered company a friendly society which has not been registered under the Friendly Societies Acts or any other Acts.

The winding-up order will be made if a large majority of members desire it, notwithstanding that an action is pending in which the society could be wound up.

The Victoria Society was formed about 1832 at Knottingley, in Yorkshire, to accumulate a fund for assisting members in sickness or calamity according to the rules. The rules provided that the members should be elected after medical examination, should pay an entrance fee and weekly payments differing according to age and be entitled to weekly payments during sickness and attendance from a doctor paid by the society, during certain times fixed by the rules; and if at the end of the time during which sick pay was allowed a member was entirely disabled he was to be entitled to 5*s.* a month for life. On the death of a member or his wife donations were provided towards his or her funeral.

The society was managed by a committee of fifteen, consisting of the officials and some elected members.

At the annual meeting of the society held on August 21, 1912, the position of the society, as affected by the passing of the National Insurance Act, 1911, was discussed, and a resolution was passed by twenty votes to eight that the society should be wound up, and a further resolution was passed that all subscriptions and sick or other payments should cease after August 27, 1912.

The number of members of the society at this date was fifty-six, and the funds consisted of 800*l.* New Consols and 770*l.* in the bank on deposit and current accounts. The funds were vested in five trustees,

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An extraordinary meeting of the society was summoned by notice for October 29, 1912, and at this meeting the resolution for a winding-up was confirmed by twenty votes to one; but as the members could not agree upon a scheme for the distribution of the assets, a further resolution was passed that the trustees, as the winding-up committee, should be empowered to apply to the Court for power to distribute the assets on the basis decided by the Court. The rules made no provision for the dissolution of the society or the distribution of its assets.

On November 9, 1912, the respondent Pickett, an old member of the society, who joined in 1866 and became disabled by a stroke of paralysis in 1910, and, after receiving sick benefit for as long as the rules permitted, was then in the receipt of the pension of 5*s*. a month, brought an action in the Chancery Division against the officials and trustees of the society asking for an injunction to restrain the defendants from distributing the funds of the society; that the rights and interests of the members of the society in its funds might be ascertained and declared; and for a receiver and all necessary accounts and inquiries.

On November 14 the five trustees of the society, of whom three were respectively president, vice-president, and treasurer, presented this petition for a winding-up order.

On November 15 Pickett moved in his action before Warrington J. for a receiver, but, on the trustees undertaking not to distribute the funds except under an order in the winding-up, no order was made.

The petition now came on for hearing.

Clauson, K.C., and *Heckscher*, for the petition. An objection has been taken that the Court has no jurisdiction to wind up an unregistered friendly society, but a friendly society, registered under the Friendly Societies Acts, has been wound up: *In re Alfreton District Friendly and Provident Society* (1); *In re 20th Century Equitable Friendly Society* (2); and the Irish case of *In re Independent Protestant Loan Fund Society* (3); and the fact that a society is not registered under those Acts makes no

(1) (1863) 11 W. R. 301; 7 L. T. 817. (2) [1910] W. N. 236.
(3) [1895] 1 I. R. 1.

difference in principle. Sect. 267 of the Companies (Consolidation) Act, 1908, which defines an "unregistered company" for the purposes of the Act, enacts that the expression shall, with certain exceptions which do not apply to this case, "include any partnership, association, or company consisting of more than seven members." [They also referred to Halsbury's Laws of England, vol. xv. p. 202.] The only question is whether it should be wound up on this petition or in the respondent's action, and the first course is the most convenient and the least expensive.

Lavington, for the secretary of the society and forty members supporting the petition.

Owen Thompson, for the respondent Pickett. The society in this case is a mere sick club in the same position as a sharing out society, or slate club. The definition in the present Act is the same as in the Joint Stock Companies Act of 1849, but Lord St. Leonards in *In re St. James's Club* (1) refused to apply the section to an ordinary club, saying, "If I were to do so, I might be called upon to carry the application much lower than to such a club as that now in question. A cricket club, an archery society, or a charitable society, would come under the operation of the Act, and indeed every club would be included." That applies to this case. In Buckley on the Companies Acts, 9th ed. p. 547, it is stated that a registered friendly society may be wound up under the Companies (Consolidation) Act, 1908; and then a little further on, "A society in the nature of an unregistered friendly society may be wound up in an action," for which the author cites *In re Lead Company's Workmen's Fund Society* (2); that appears to imply that an unregistered society can only be wound up in an action. In any case there must be an inquiry of what the funds consist and who are entitled to them. If the parties are reasonable that inquiry can be ordered on a summons in the action with as little expense as on a summons in the winding-up.

Neville J. In my opinion this Court has jurisdiction to make a winding-up order in the case of an unregistered as well as in that of a registered friendly society. There is ample

(1) (1852) 2 D. M. & G. 383, 389. (2) [1904] 2 Ch. 196.

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anthority for making the order in the case of a registered friendly society, and I cannot see that the absence of registration under the Friendly Societies Acts makes any difference. An unregistered friendly society is clearly within the words of s. 267 of the Companies (Consolidation) Act, 1908. I think that I ought to make the order on this petition, notwithstanding the existence of the action, in order to give effect to the express wishes of the great majority of the members of the society.

Solicitors: *Blundell, Gordon & Co., for Carter, Atkinson & Bentley, Pontefract; Simpson, Thomas & Co., for Clegg & Baines, Leeds.*

J. R. B.

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In re WEST YORKSHIRE TRAMWAYS ACT, 1906.

[1906 W. 2932.]

Tramway Company—Abandonment — Deposit — Landowner—Compensation—Statutory Obligation — Obligation to construct Works "unless otherwise agreed"—"To the reasonable satisfaction of" another—Construction.

A private Act of Parliament authorized a company to construct a tramway and other works. It provided (inter alia) that, "unless otherwise agreed in writing between" the district council and the company, the company should commence and complete the tramway within two years, and "carry out to the reasonable satisfaction of the council the widenings" authorized by the Act. No such agreement in writing was entered into:—

Held, reversing the decision of Warrington J., that until an agreement altering the scheme of works was made there was an absolute statutory obligation on the company to do the works, and that a landowner whose property had been rendered less valuable by the abandonment of the undertaking was entitled to compensation out of the parliamentary deposit.

In re Ruthin and Cerrig-y-Druidion Railway Act (1886) 32 Ch. D. 438, followed.

APPEAL from a decision of Warrington J.

The appellant Mr. R. C. Foster was the leaseholder for a long term of years of a shop at the corner of Southgate and Victoria Road, Elland, Yorkshire, which crossed each other at right angles, and also of an adjoining shop facing Southgate. By an agreement in writing dated March 19, 1906, he entered into a conditional contract with Messrs. Schlesinger, Jervis, Bernheim &

Cownie, the promoters of a Bill which afterwards became the West Yorkshire Tramways Act, 1906 (6 Edw. 7, c. cxlix.), whereby he agreed to sell to them, upon the Royal assent being obtained to the Bill, his leasehold interest in a part of the site of the corner shop. The land sold was a triangular piece of ground which included the whole frontage on to Southgate and Victoria Road, and the sale left him the rest of the site, consisting of another triangular piece of land between the land he was selling and his adjoining shop. The agreement contained no covenant by the promoters to construct tramways or do any other works.

The Bill became law on August 4, 1906, and purported "to incorporate the West Yorkshire Tramways Company and to empower that company to make and maintain tramways tramroads and other works and for other purposes."

By the interpretation clause (s. 3), unless the context otherwise required, "'the tramway' and 'the tramways' mean and include the tramways and the tramroads and other works by this Act authorised and so much of the tramway No. 1 authorised by the Act of 1900 as is authorised to be constructed by the company."

By s. 5 the company was authorized to construct the tramways and other works there enumerated, including in tramway No. 8, the line in question, "Widening No. 4.—A widening in the parish and urban district of Elland of Southgate and Victoria Road on the south-west and south-east sides thereof respectively commencing in Southgate at a point 0·70 chain or thereabouts measured in a south-easterly direction from the intersection of Victoria Road and Southgate and terminating in Victoria Road at a point 1·25 chains or thereabouts measured in a south-westerly direction from the said point of intersection of Victoria Road and Southgate." This widening was necessary to enable tramcars to pass round the appellant's corner shop, and it was for that purpose that he sold the land.

By s. 9 the period limited for the construction of the works was five years. The material sections were as follows:—

66. "Whereas pursuant to the Standing Orders of both Houses of Parliament and to the Parliamentary Deposits Act 1846 a sum of two thousand three hundred and seventy-two pounds eleven shillings two and a half per centum consolidated stock

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representing five per centum upon the amount of the estimate in respect of the tramways and four per centum in respect of the street widenings and other works authorised by this Act has been transferred into the name of the Paymaster-General for and on behalf of the Supreme Court in respect of the application to Parliament for this Act to the credit of ex parte the undertaking of the West Yorkshire Tramways Bill 1906 (which sum is referred to in this Act as 'the deposit fund') Be it enacted that notwithstanding anything contained in the said Act the said deposit fund shall not be paid or transferred to or on the application of the person or persons or the majority of the persons named in the warrant or order issued in pursuance of the said Act or the survivors or survivor of them (which persons survivors or survivor are or is in this Act referred to as 'the depositors') unless the company shall previously to the expiration of the period limited by this Act for completion of the tramways open the same for the public conveyance of passengers and if the company shall make default in so opening the tramways the deposit fund shall be applicable and shall be applied as provided by the next following section. . . . ."

67. "If the company do not previously to the expiration of the period limited for the completion of the tramways complete the same and open them for the public conveyance of passengers then and in every such case the deposit fund or so much thereof as shall not have been paid to the depositors shall be applicable and after due notice in the London Gazette shall be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement construction or abandonment of the tramways or any portion thereof or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act and also in compensating all road authorities . . . ."

68. "On the application of the depositors at any time after the passing of this Act the High Court may and shall order that a sum being the portion of the deposit fund applicable to the street widenings and other works other than the tramways by this Act authorised and the interest and dividends thereon shall

be paid or transferred to the depositors or any other person or persons whom the depositors may appoint in that behalf."

81. "For the protection of the Elland Urban District Council (hereinafter called 'the council') the following provisions unless otherwise agreed in writing between the council and the company and notwithstanding anything contained in this Act shall apply and have effect (that is to say) :—

"(1.) Unless the Corporation of Halifax shall on or before the twenty-second day of July one thousand nine hundred and seven construct and open for public traffic so much of tramway No. 15 authorised by the Halifax Corporation Act 1900 as lies between its commencement and its junction with tramway No. 24 authorised by the same Act and also the whole of the said tramway No. 24 and tramway No. 26 authorised by the Halifax Corporation Act 1902 the company shall so soon as is reasonably possible after the said twenty-second day of July one thousand nine hundred and seven commence and continue the construction of tramway No. 8 by this Act authorised and shall within two years from the passing of this Act complete and open for public traffic at least so much of tramway No. 8 as is situate between West Vale and Elland Town Hall;

"(2.) Concurrently with the construction of so much of tramway No. 8 as is situate between West Vale and Elland Town Hall and before opening such portion of the said tramway for public traffic the company shall execute and carry out to the reasonable satisfaction of the council the widenings Nos. 4 5 6 6A 6B and 7 authorised by this Act."

The Corporation of Halifax did not construct the above-mentioned tramways. By an agreement of December 17, 1906, between Mr. Foster and the company the latter adopted the agreement of March 19. By another agreement of January 28, 1908, the purchase-money was fixed at 1200*l.*, and it was agreed that all the materials arising from the demolition of the building on the land sold should be the property of Mr. Foster. On July 22, 1909, the land was assigned to the company, and the

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purchase-money was duly paid. The company did not pull down the purchased buildings nor make the tramway nor widen Victoria Road, and the undertaking was abandoned. The depositors took out a summons asking that the money representing the parliamentary deposit should be paid out to them, and an inquiry was directed. In July, 1912, the Master certified that no property of any landowner or other person had been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramway; that there were no creditors of the company; and that the depositors were entitled to the fund. Mr. Foster took out a summons asking that, notwithstanding the certificate, he might be at liberty to come in and prove his claim for compensation as a landowner who had suffered loss and damage by the abandonment of the company's undertaking or as a creditor of the company in respect of such loss and damage.

Warrington J. held that under s. 81 the company was under no absolute obligation to effect the widening. It was left to the urban district council to decide whether the widening was to be made. If the company did not construct that particular tramway, then there was no obligation to make the widening at all; if they did construct it, then the widening would have to be made, unless the urban district council entered into an agreement to the contrary; but it was open to them so to do. Mr. Foster could only come in as a creditor of the company if there had been some obligation on the company to widen the street, which obligation had been broken. There was no contractual obligation between the company and Mr. Foster; therefore any claim by him as a creditor must fail. If he had any claim at all, it was as a person whose property had been interfered with or rendered less valuable. Mr. Foster contended that the diminution in value of his property was occasioned by the abandonment of the tramroad. That was not the case. The diminution of value, assuming it to exist (and his Lordship thought in all probability it did exist), was occasioned not by the abandonment of the tramroad, but by the fact that the street was not widened. His Lordship held, on the authority of *In re*

Southport and Lytham Tramroad Act, 1900 (1), that unless the diminution of value resulted from the abandonment of the tramway, and necessarily resulted from that and nothing else, the applicant was not entitled to succeed. In this case it did not necessarily result from the abandonment of the tramway. The tramroad might, under the provisions of the Act, have been constructed and the street not have been widened. So, too, the street might be widened and the tramroad not constructed. His Lordship therefore dismissed the application, and Mr. Foster appealed.

Levett, K.C., and *Percy Wheeler*, for Mr. Foster. The appellant is entitled to succeed either as a landowner whose property has been injured by the abandonment of the undertaking or as a creditor of the company. It is true that none of the contracts contain an absolute covenant by the promoters to do the works, but by that of January 28, 1908, the company agreed to pull down the house and give us the materials. That is a covenant for the breach of which we are entitled to sue as creditors. Further, the land was bought for the express purpose of widening Victoria Road, and we were to have a complete frontage; that must be regarded as a contract between the parties: *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners*. (2) But there is also a binding statutory obligation on the company to construct the tramway and the works connected with it. The widening of Victoria Road was indispensable to enable the cars to get round the corner. We sold our land in consideration of 1200*l.* in cash and a new frontage to Victoria Road, and by the abandonment of the undertaking we have been deprived of the frontage and of the benefit which we should have received from the presence of a tramway running past our door. The widening was part of the undertaking, therefore our remaining property has been rendered less valuable by the abandonment of the tramway, and we are entitled to make this claim under s. 67. Our property has obviously been injured. The measure of the loss must be determined by comparing the value of the estate immediately before with its value immediately after the abandonment: *In re*

(1) [1911] 1 Ch. 120. (2) (1882) 7 App. Cas. 694.

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Potteries, Shrewsbury and North Wales Ry. Co. (1); *In re Ruthin and Cerrig-y-Druidion Railway Act.* (2) Damages for breach of covenant do not come within s. 67, so on this point we rely on the statutory obligation imposed by s. 81: *In re Southport and Lytham Tramroad Act*, 1900. (3)

Crossfield (*Cave*, *K.C.*, with him), for the depositors. Warrington J. was right in holding that the diminution in value of Mr. Foster's land was occasioned not by the abandonment of the tramroad, but by the fact that the street was not widened, and that there was no absolute statutory obligation on the company to effect that widening. In s. 67 the context requires (as provided by the interpretation clause) that the word "tramways" should be confined strictly to tramways and not include other works. Again, no statutory obligation is imposed upon the company to construct the tramway. If they did so, certain conditions were imposed on them, but the right to make it was by s. 81 conditional on there being no agreement to the contrary with the council. By sub-s. 1 the company were to do the works unless certain other works were done by the Halifax Corporation; and by sub-s. 2 they were to carry out this widening "concurrently with the construction" of the tramway and "to the reasonable satisfaction of the council." Inasmuch as the council could have released the company from their obligations under the Act the non-widening was not a necessary consequence of the abandonment. It might have been a necessary consequence if the construction of the line had ever been commenced. This case comes exactly within the decision in *In re Southport and Lytham Tramroad Act*, 1900. (3) If your Lordships are of opinion that this appeal should succeed on the ground that the appellant is a landowner whose property has been injured, it is unnecessary to consider the second point. Mr. Foster was out of time and agreed to pay the costs of the hearing in the Court below as a condition of being heard: this Court will not alter that agreement.

No reply was called for.

(1) (1883) 25 Ch. D. 251. (2) 32 Ch. D. 438.
(3) [1911] 1 Ch. 120.

COZENS-HARDY M.R. stated the facts, and continued. Sect. 66 recites that the parliamentary deposit, with the funds of which we are now dealing, had been paid into Court, and then it says, notwithstanding anything in the general Act, it is not to " be paid or transferred to or on the application of the person or persons . . . . named in the warrant . . . . unless the company shall previously to the expiration of the period limited by this Act for completion of the tramways open the same for the public conveyance of passengers, and if the company shall make default"—which happened—" the deposit fund shall be applicable and shall be applied as provided by the next following section." Then the next following section says that if the company do not previously to the expiration of the period limited for the completion of the tramways complete the same and open them for the public conveyance of passengers, then the deposit fund or so much as has not otherwise been dealt with shall be applied towards compensating any landowner or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramways or any portion thereof. Then s. 68 seems to me to have no direct bearing upon the case. It provides that a portion of the deposit fund which had been paid in before the Act became law might and should immediately after the passing of the Act be paid out so far as the deposit related to what I may call the widening fund. Then there is provision not merely for making the tramways, but for making certain widenings, and very numerous widenings are specified in the Act: amongst others is No. 4, which deals with a widening at this very point on the south-west and south-east sides of Southgate and Victoria Road—it defines them with great accuracy. Then we go to another part of the Act and we find that there is an express limit of time within which the tramways are to be completed and opened for public works; and in s. 81 there is this provision for the protection of the Elland Urban District Council, that " the following provisions unless otherwise agreed in writing between the council and the company and notwithstanding anything contained in this Act shall apply and have effect." It is not suggested that there has

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been any agreement in writing between the council and the company varying these obligations, and therefore these are obligations which at all material dates must be taken to be in force. Sub-s. 1, in the latter part of it, says that, in the event which happened, "The company shall so soon as is reasonably possible after the said 22nd July, 1907, commence and continue the construction of tramway No. 8 by this Act authorised and shall within two years from the passing of this Act complete and open for public traffic at least so much of tramway No. 8 as is situate between West Vale and Elland Town Hall." It is conceded that that portion of the tramway includes the part which passes along Southgate and Victoria Road. Sub-s. 2 says, "Concurrently with the construction of so much of tramway No. 8 as is situate between West Vale and Elland Town Hall and before opening such portion of the said tramway for public traffic the company shall execute and carry out to the reasonable satisfaction of the council" the particular widening which was contemplated of this triangular piece.

In my opinion we do find there, in the events which have happened, a positive statutory obligation upon the company within two years from the passing of the Act to commence and continue the construction—that they did not do—and concurrently with the construction and before opening for traffic to carry out this widening. They did not even commence the construction. They had to carry out the widening to the reasonable satisfaction of the council; but that is not a limitation of the obligation. There is a positive obligation to do it. Unless there is an agreement in writing varying it, that positive obligation is that they are to do the widening to the satisfaction of the urban district council.

That being so, it seems to me that the case falls within the authorities to which our attention has been called. I do not attach much or indeed any direct importance to *In re Southport and Lytham Tramroad Act*, 1900 (1), which was a case purely upon obligation under covenant as distinct from obligation under statute. But, on the other hand, *In re Ruthin and Cerrig-y-Druidion Railway Act* (2) seems to me to be a strong authority

(1) [1911] 1 Ch. 120. (2) 32 Ch. D. 438.

in favour of the present appellant. It is strong because the Court held there that the obligation, though it formed an obligation on a covenant, was so much of a statutory obligation that it ought to be treated as though it were a statutory obligation. That being so, I think it is impossible to say that the appellant is not within s. 67, because the abandonment of the undertaking in effect prevents the company from doing that which ought to have been done but for the abandonment, and which, if done, must have been preceded by the widening of the road.

In my opinion the view taken by Warrington J. on this point is wrong; with great respect I cannot follow his reasoning when he says "Now the point of that is that the company was under no absolute obligation to effect that widening." The learned judge seems to have thought that the words "to the reasonable satisfaction of the council" prevented it from being an absolute obligation. It was not an absolute obligation in the sense that by agreement in writing the two could not have put an end to it, but unless and until there was an agreement in writing it was an absolute obligation to widen, and to widen it to the satisfaction of the council. That dealt with the mode and extent of the widening, but it did not make the whole thing contingent. That is really the point of the learned judge's judgment, and if he is right in that view I think he was right in his decision; but finding, as I do, that there was in the events which happened an absolute obligation to effect this widening, it is impossible to say that the appellant is not a landowner who was prejudicially affected within the meaning of s. 67. That being so, he must be allowed to take in a claim for compensation, and it must go back to the Master to inquire the amount (if any) by which the appellant's property has been interfered with or rendered less valuable by the abandonment of the tramway.

That being so, without interfering in any way with the order as to costs made by the learned judge in the Court below, I think the appellant is entitled to his costs here, and there will be the usual set-off between the two.

FARWELL L.J. I am of the same opinion. The question is, Has the appellant's remaining property been rendered less

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valuable by the abandonment of the undertaking? It appears to me on the facts either proved or admitted, and a great many of the facts here speak for themselves, that it is obvious that there must have been some deterioration of this property. [His Lordship referred to the facts and ss. 66, 67, and 68 of the Act, and continued:]

I confess I am unable to understand why s. 68 was passed, or, if it was intended to be passed, why the 4 per cent. in respect of the street widenings was paid in as stated in s. 66. It is paid in according to s. 66 as the measure of that portion of the deposited fund as a security; but instead of being kept as security with the rest of the money under the Act it is to be immediately paid out on the passing of the Act under s. 68. I confess I do not understand the object of it. If I might venture to suggest such a thing of the Legislature, it must have been done by some oversight. They could not have intended that the money should be paid in one day and paid out again the next. However that may be, the whole fund and not merely the street widening fund is allocated for the protection of landowners who are injured by the abandonment of the tramway. The value of this landowner's remaining property has been obviously injured by the abandonment of the tramway, and the fund therefore is applicable to the purposes suggested by the appellant and is not payable to the depositors.

Then we come to the statutory obligations, as distinct from the statutory powers, which appear in s. 81. I have nothing to add to what the Master of the Rolls has said. A direct statutory obligation, qualified only by the words "unless otherwise agreed" by another party, remains a statutory obligation unless and until such an agreement has been entered into. That disposes of the only reason upon which the learned judge has relied in the Court below. I think also, with deference to the learned judge, that he has a little misread s. 81, sub-s. 2, which provides for the making of the tramway and only prevents the opening of it until the widening has been executed to the reasonable satisfaction of the council. However that may be, I think it is plain on the construction of the Act that there is a statutory obligation which now cannot be carried out, and on the face of it the

omission must be to the detriment of the landowner. The appeal must be allowed.

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Solicitors: *Williamson, Hill & Co., for Land & Foster, Halifax; Deacon & Co.*

H. C. R.

HUGHES *v.* OXENHAM.

NEVILLE J. 1912 — *Nov.* 29.

[1912 H. 938.]

Mortgagor and Mortgagee—Foreclosure Summons—Service out of the Jurisdiction—Practice—Rules of the Supreme Court. Order XI., *rr.* 1 (*e*), 8A.

Hughes v. *Oxenham*, p. 181, was reversed in C. A. Dec. 20, 1912, see [1913] W. N. at p. 11.

resident in England, but the defendants were now resident in Australia.

On February 12, 1912, the plaintiff issued an originating summons against the defendants claiming an account of what was due under the mortgage, and to enforce what should be found due by foreclosure or sale, and, on April 1, obtained an order giving him leave to serve the summons out of the jurisdiction on the defendants in Australia. After the defendants had been served in Australia, one of them entered a conditional appearance and now moved to discharge the order of April 1.

Tomlin, for the motion. Under rr. 1 and 8A of Order XI. a writ and an originating summons are on the same footing with

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respect to service out of the jurisdiction, and it is submitted that there was no jurisdiction under r. 1 (*e*) to give leave to serve this summons out of the jurisdiction, because a proceeding to enforce a mortgage is distinct from an action for breach of contract. At law the mortgagee has the legal right to the property subject to the mortgagor's equitable right to redeem, and when the mortgagee brings an action to foreclose the intention is to compel the mortgagor to redeem, and in default to put an end to his equitable right to redeem and to obtain a declaration that the mortgagee is the absolute owner of the property on which the charge exists. Such an action therefore is not founded on a breach of contract within the meaning of r. 1 (*e*): *Deutsche National Bank* v. *Paul* (1); *Kolchmann* v. *Meurice*. (2)

[NEVILLE J. In *Deutsche National Bank* v. *Paul* (1) the defendants were assignees of the equity of redemption and there was no privity of contract between them and the mortgagees; and *Kolchmann* v. *Meurice* (2) was an attempt by a judgment creditor to obtain a charging order on the defendant's interest in shares and was an action that was clearly not founded on a breach of contract.]

That is so, but it is submitted that the principle of those decisions governs this case.

Owen Thompson, for the defendants, was not called upon.

NEVILLE J. If I thought that the decision of Stirling J. in *Deutsche National Bank* v. *Paul* (1) was in pari materia I should of course follow it, but I do not think it is for the reason I have stated. This is an action by the original mortgagee against the original mortgagors and is in my opinion an action founded on breach of contract because, unless there had been a breach by the original mortgagors of their covenants in the mortgage deed, the action could not have been maintained. The motion therefore fails and must be dismissed with costs.

Solicitors: *Pritchard, Englefield & Co.; Peacock & Goddard.*

(1) [1898] 1 Ch. 283. (2) [1903] 1 K. B. 534.

H. L. F.

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In re VIC MILL, LIMITED.

[No. 1 of 1909.]

Sale of Goods—Contract for Goods to be manufactured—Measure of Damages—Company—Voluntary Winding-up—Proof.

Where there is a contract for the sale of goods to be made to order by the vendor and a breach of contract by the purchaser's refusal or inability to accept the goods, the measure of damages is the profit which the vendor would have made if the contract had been carried out.

The Vic Mill, Limited, went into voluntary liquidation on July 12, 1909: a supervision order was made on July 27, 1909. The claimants, Messrs. Arundel & Co., were a firm of engineers from whom the company had ordered certain machinery of which, owing to the winding-up, they had not been able to accept delivery. They made a claim to prove in the liquidation for loss of profit in respect of the following items:—

	Contract Price.			Loss of Profit.		
	£	s.	d.	£	s.	d.
(1.) 4 quick traverse winding frames	465	14	0	162	19	0
(2.) 38 ring doubling frames	5220	0	0	783	0	0
(3.) 1 gassing frame	287	0	0	157	17	0
(4.) 2 preparing machines	110	0	0	55	0	0
(5.) 1 bundling press	22	10	0	1	2	6
(6.) 1 warping mill	35	10	0	6	4	3
(7.) 1 beaming machine	32	15	0	1	12	9
				£1167	15	6

The liquidators rejected this claim on January 5, 1912. The claimants appealed, and Neville J. referred the matter to the district registrar for "an inquiry for what sum if any the applicants should be allowed to prove in the liquidation in respect of the items of machinery included in their claim ordered but not delivered."

On August 2, 1912, the registrar certified that the amount for

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which the claimants were entitled to prove was 280*l.* 15*s.* 3*d.* In a memorandum giving reasons for his certificate the registrar stated that the amounts claimed by the claimants as the profits they would have made were not challenged by the liquidators, but the measure of damages for non-acceptance of goods was the loss directly and naturally resulting in the ordinary course of events from the breach of contract; and though the loss of prospective profit might be taken into account in assessing damages, he did not accept the contention that the whole of such prospective profit was necessarily to be taken as the loss.

He found, as to the facts, that the machines in item No. 1 had been completed and were ready for delivery at the commencement of the winding-up. The claimants retained the machines for some time, made some alterations, and then sold them at a net price, which was 23*l.* less than the company was to pay. He considered that the measure of damages was the difference between the contract price and that made on resale, plus the cost of alteration. He fixed that cost at 5*l.* and assessed the damages at 28*l.*

As to items 2, 3, 4 and 6 he found that the claimants had not commenced to manufacture any of these machines at the commencement of the winding-up. The ring doubling frames consisted of iron framework which the claimants would have manufactured, and spindles, rings, and rollers which they would have purchased. The spindles, rings, and rollers had been purchased by and delivered to the claimants, but they had done no work on them. These spindles, rings, and rollers were afterwards used by the claimants to complete other orders, and there was no evidence of actual loss. The cost of the spindles, rings, and rollers represented 40 per cent. of the cost of the frames complete.

The gassing frame, preparing machines, and warping mill would have been wholly manufactured by the claimants. No raw material had been purchased expressly for their manufacture. There was no evidence that the claimants' works had been wholly or partially stopped in consequence of their not manufacturing those machines, or that the orders on which the works were employed were of a less remunerative nature than

the orders in respect of which the claim for damages was made. In the case of the machines in items 2, 3, 4 and 6 the registrar was of opinion that the claimants were entitled to have the prospective profits taken into account, but having regard to the circumstances he did not think that the loss directly and naturally resulting from the breach of contract amounted to anything approaching the whole of such prospective profit, and he assessed the damages for these items at 250*l.* As to items 5 and 7 he found that these machines would not have been manufactured by the claimants, but purchased by them and resold to the company. The amount claimed was the difference between the price they would have paid and that at which they had contracted to sell to the company. In these cases he allowed the amount claimed, 2*l.* 15*s.* 3*d.*

The claimants took out this summons to vary the certificate by allowing the full amounts claimed.

Gore-Browne, K.C., and *H. S. Preston*, for the summons. The general rule as to the measure of damages for breach of contract is that the person who suffers from the breach is to be put into the same position as if the contract had been carried out. Where the breach of contract consists in failing to accept goods specially ordered to be manufactured, the only way in which that can be done is to give the manufacturer the profits he would have made. That is what the claimants have claimed, and it is not disputed that the estimates of profits are correct. The rule is settled: see Benjamin on Sales, 5th ed. p. 806; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50, sub-ss. 1, 2; *Silkstone and Dodsworth Coal and Iron Co.* v. *Joint Stock Coal Co.* (1); *Cort* v. *Ambergate, Nottingham, and Boston and Eastern Junction Ry. Co.* (2)

The difference between the contract price and the market price is only the measure where there is an available market. Here there was none. [They also referred to the American cases of *Todd* v. *Gamble* (3) and *Masterton* v. *Mayor of Brooklyn*. (4)

(1) (1876) 35 L. T. 668.
(2) (1851) 17 Q. B. 127.
(3) (1896) 148 N. Y. 382.
(4) (1845) 42 Am. Dec. 38; 7 Hill, 61.

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A. Grant, K.C., and *C. E. R. Abbott*, for the liquidators. Where there is an available market the measure of damages is the difference between the contract price and the market price at the time when the goods ought to have been delivered if a time was fixed; if it was not, when the goods were refused.

The general rule is so stated in *Braithwaite* v. *Foreign Hardwood Co.* (1); Mayne on Damages, 8th ed. 202—3; and the general rule is admitted in *Silkstone and Dodsworth Coal and Iron Co.* v. *Joint Stock Coal Co.* (2) But the circumstances of that case were very special. The coal was of a peculiar kind for which there was no market and it could not be stored. The ordinary rule could not be applied, and so the Court looked at profit. The case depended on its special circumstances and established no rule. It is not cited in any work on damages.

Cort v. *Ambergate, Nottingham, and Boston and Eastern Junction Ry. Co.* (3) was before the Act. The creditor had bought iron for the purposes of the contract which he could only sell at a loss, but he did not get profits, he was only allowed the difference between what he paid for the iron and what he could sell it for. In this case there was a market, for the machines were actually sold.

Masterton v. *Mayor of Brooklyn* (4) was not the case of a manufacturer at all, the creditor was a mere middleman.

NEVILLE J. In my opinion the general rule in the case of breach of contract is that the plaintiffs, by way of damages, are entitled to be put in the same position as they would have been in if the contract had been completed. That I believe to be the general rule affecting damages in every case; but both before and, by statute, after the Sale of Goods Act, 1893, the prima facie measure of damages, where there is an available market for the goods, is the difference between the contract price and the market price of the goods in question.

First of all to deal with the goods which were not made. I think it is obvious, if you are putting the claimants in the same position as they would have been in if they had fulfilled their

(1) [1905] 2 K. B. 543.
(2) 35 L. T. 668.
(3) 17 Q. B. 127.
(4) 42 Am. Dec. 38; 7 Hill, 61.

contract, you can do that in one way only, and that is by giving them the profits they have lost, and, in such a case, that must be the beginning and end of the matter.

With regard to the goods that had been manufactured, the question is whether there was an available market for the goods. I think there obviously was not. If the claimants had done what it was suggested they ought to have done, sold against the liquidating company, the result would, in my opinion, have been that the damages would have amounted not only to the loss of profit, but probably to the whole, or nearly the whole, cost of manufacture as well, because I imagine that the only way of selling against the company in the present case would have been to have sent the machines that were ordered to the nearest auction rooms, where they would probably have been sold for the value of the metal they contained. It seems to me goods made to order stand on quite a different footing from other goods because they are not made for the market. It may be there is an available market and it may be there is not; but, as a rule, if you sell against the purchaser you put him in a great deal worse position than the claimants claim to put him in in the present case. Here they claim no more than loss of profit. Take the case of an order for an article which is perfectly useless to anybody but the person who ordered it; what is the measure of damage in that case if the contract is not fulfilled? It is not only the loss of profit, but includes the loss of the cost of the article that cannot be disposed of. In my opinion there was no available market for the goods, and the claimants have claimed, I think, the right measure of damages. I think the registrar's decision was wrong. I am not going precisely into the figures. I understand they are really agreed, because there is no dispute as to what the percentage of profit was, and, that being worked out, I give the claimants the whole of it. The liquidators must pay the claimants' costs and retain their own out of the assets.

Solicitors: *Robinson & Bradley, for Brown, Briggs & Symonds, Stockport; Marston & Robinson, for W. Arthur Taylor, Manchester.*

J. R. B.

NEVILLE J. *In re* CENTRIFUGAL BUTTER COMPANY, LIMITED.

1912
Dec. 3.

[00362 of 1911.]

Company — Voluntary Winding-up — Summons in Winding-up to rescind Contract—Jurisdiction—Discretion of Court—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 193, 215.

A company was formed for the purpose of entering into, and had executed, an agreement for the purchase of certain options. The articles of association provided that it should be no objection to the agreement that the vendors were promoters and directors and stood in a fiduciary relation to the company. The options depended on an agreement between the vendors and the French owners of a business; this agreement was disputed, and ultimately declared void by a French Court. The company then went into voluntary liquidation, and the liquidators took out this summons to set aside the agreement between the company and the vendors:—

Held, that it was doubtful whether the Court had jurisdiction on a summons under s. 193 to set aside a contract, but if it had such jurisdiction it was discretionary and ought not to be exercised in this case; and no proceedings could be taken against the directors for misfeasance under s. 215 until the agreement, which was valid according to the constitution of the company, had been set aside.

The owners of a butter factory at St. Pierre-sur-Dives in Normandy agreed by letter, dated June 9, 1910, to give to F. W. Nicholls and C. Anderson, two Englishmen, an option, to be exercised within two months, to take a lease of their factory and premises with the machinery plant and material for fourteen years, with a further option, to be exercised during the continuance of the lease, to purchase the freehold.

On July 30, 1910, Nicholls and Anderson gave notice to the French owners to exercise their option. They formed a company in London to take over these options, which was registered on August 3, 1910, and its objects were stated in the memorandum to be (inter alia) to acquire the said options and carry on the business of a butter factory and for that purpose to enter into the agreement referred to and identified in the articles.

This agreement was made between Nicholls and Anderson of the one part and the company of the other part for the sale to the company of the said options for a sum in cash and 6000 1*l.*

fully-paid shares of the company. Nicholls and Anderson were made directors of the company.

The third article of association contained the following passage :—" The basis upon which the company is established is that the company shall acquire the said butter factory and premises and other rights and property comprised in the said agreement, and that the said Frank Wilmot Nicholls and Charles Anderson shall be two of the first directors of the company, and accordingly it shall be no objection to the said agreement that the said Frank Wilmot Nicholls and Charles Anderson as promoters, directors or otherwise stand in a fiduciary relationship towards the company, and every member of the company present and future is to be deemed to join the company on this basis."

The agreement was executed by the company on September 5, 1910, and 6000 fully-paid shares were duly allotted to Nicholls and Anderson or their nominees in pursuance thereof.

Nicholls and Anderson as directors endeavoured to obtain a lease for the company from the French owners, but differences arose as to the terms of the lease, and ultimately the French owners refused to complete. Proceedings were taken on behalf of the company in the local Court of Lisieux to enforce the contract, but in July, 1911, the Court gave judgment for the French owners, on the ground that there was no binding contract to grant a lease.

On September 19, 1911, the company passed an extraordinary resolution for a voluntary winding-up, and two joint liquidators were appointed. The time for appealing against the decision of the French local Court did not expire until November 24, but the liquidators took no steps to appeal.

This summons was taken out by the liquidators on July 5, 1912, asking that the agreement of September 5, 1910, might be set aside and the shares allotted in pursuance of it cancelled.

B. A. Hall, for the liquidators. The French Court has decided that the original contract to give an option was void. The contract between Nicholls and Anderson and the company cannot therefore be carried out and ought to be set aside, and the allotment of shares made under it cancelled. The Court has

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jurisdiction under s. 193 to determine any question which arises in the voluntary winding-up.

[NEVILLE J. That section gives the Court the same powers as in a compulsory winding-up. What section gives the Court power to set aside a contract in a compulsory winding-up ?]

Sect. 215, the misfeasance section; the defendants here were promoters, directors, and vendors, and the contract was a misfeasance.

[*T. J. C. Tomlin*, for the defendants, interposing, referred to article 3 of the articles of association.]

Apart from any question of misfeasance, the question of the validity of the contract must be settled in order to decide whether the shares issued to the defendants are fully paid, and whether the liquidators are to carry out the contract by paying cash to the defendants; and whether they are to make calls upon the other shares in order to equalize the loss in division of the assets, or for payment of cash. *In re Union Bank of Kingston-upon-Hull* (1) and *In re Oakwell Collieries Co.* (2) are authorities that the Court has jurisdiction and will not cut down the meaning of s. 193.

T. J. C. Tomlin, for the defendants, was not called on.

NEVILLE J. The real question in this case is whether the Court ought to allow s. 193 of the Companies (Consolidation) Act, 1908, to be used for the purpose of setting aside a contract between the company and third parties. I am not sure whether it is a question of jurisdiction or only one of discretion. I cannot in this case make any distinction between a contract with directors and a contract with other persons, because the original contract was clearly in order having regard to the constitution of the company. I cannot find the directors guilty of misfeasance until the contract is set aside, and I am doubtful whether I have jurisdiction to set aside the contract on this summons. In the *Oakwell Collieries Case* (2), which was relied on, the application was for delivery up to the company of possession of an estate to which they were prima facie entitled; that is quite a different case from the one before me. But if I

(1) (1880) 13 Ch. D. 808. (2) [1879] W. N. 65.

have jurisdiction I am clearly of opinion that I ought not to exercise it. Before coming here for relief the applicants must bring an action for rescission of contract and succeed in it.

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Solicitors: *C. H. Walton & Hurd; Charles Anderson & Co.*

J. R. B.

In re TEOFANI & CO.'S TRADE MARK.

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1912
Dec. 3, 4.

Trade Mark—Registration—Special Application to register Surname—Order of Board of Trade directing Registrar to proceed with Application—Application to remove Mark from Register—Effect of Order of Board of Trade—Jurisdiction of Court to entertain Application—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* 5—*Trade Marks Rules*, 1906, *r.* 41.

In 1909 Teofani & Co., Limited, obtained an order of the Board of Trade under s. 9, par. 5, of the Trade Marks Act, 1905, directing the Registrar of Trade Marks to proceed with a special application to register its trade mark "Teofani," which was the family name of one of the predecessors in business of the company, and the mark was subsequently registered. On an application under s. 35 of the Act by a person named Teofani for an order that the register might be rectified by the removal therefrom of the company's trade mark:—

Held, that the order of the Board of Trade, having been made by a tribunal of co-ordinate jurisdiction with the Court, was final and conclusive, and that the Court had no jurisdiction to entertain the application.

MOTION.

In 1887 Panajotti Teofani and one Constantine Mericas established in London a business of tobacco and cigarette manufacturers which they carried on under the name of Teofani & Co. until 1908. In that year a company, called Teofani & Co., Limited, was incorporated to take over and carry on that business, and Panajotti Teofani became its governing director.

On April 5, 1909, a special application was made by the company under s. 9, par. 5 (1), of the Trade Marks Act,

(1) The Trade Marks Act, 1905, provides:

Sect. 9. "A registrable trade mark must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

. . . . .

"(5.) Any other distinctive mark,

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1905, to register the word "Teofani" as a trade mark in class 45 in respect of manufactured tobacco.

On July 10, 1909, the company's case was sent by the Registrar of Trade Marks to the Board of Trade pursuant to r. 38 of the Trade Marks Rules, 1906 (1), and on October 19, 1909, an order

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but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.), and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark:

. . . . . .

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

. . . . . ."

Sect. 35. "Subject to the provisions of this Act—

"(1.) The Court may on the application in the prescribed manner of any person aggrieved . . . . by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register . . . . make such order for . . . . expunging . . . . such entry, as it may think fit:

"(2.) The Court may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connexion with the rectification of the register:

. . . . . ."

Sect. 44. "No registration under this Act shall interfere with any bonâ fide use by a person of his own name or place of business or that of any of his predecessors in business . . . ."

(1) The Trade Marks Rules, 1906, provide under the heading

"*Special Applications under Paragraph 5 of Section 9.*"

. . . . . .

Rule 38. ". . . . the applicant shall send to the registrar in writing a case in duplicate stating at length the grounds on which he relies in support of his application, and whether he desires to be heard by the Board of Trade or by the Court.

. . . . . .

"Upon receipt of such case the registrar shall send the same to the Board of Trade for their information, together with a copy of all communications that have passed between the registrar and the applicant."

Rule 39. "Upon receipt of such case the Board of Trade shall, if the applicant desires to be heard by them, fix a day for such hearing, at which the applicant and the registrar may attend and be heard, and the Board shall make an order determining whether and subject to what conditions, amendments, or modifications, if any, the application is to be accepted, or may require the applicant to apply to the Court and limit a time for that purpose."

Rule 40. "If the applicant desires to obtain an order of the Court he

was made by the Board of Trade directing the registrar to proceed with the company's application. Evidence was filed in support of the application, and, as the registrar did not desire a hearing, the mark was allowed to go forward for registration.

On December 20, 1909, the mark (No. 312,065) was duly registered.

This was an application under s. 35 of the Act by Athanasius Teofani, a brother of Panajotti Teofani, who carried on business as a tobacco and cigarette manufacturer, for an order that the register of trade marks might be rectified by the removal therefrom of the company's trade mark.

The applicant, by his particulars of grounds of objection, alleged (inter alia) that he had, pursuant to s. 44 of the Act of 1905, an independent and concurrent right to the use of his own surname in common with Teofani & Co., Limited; that he had never transferred or otherwise parted with his right to use that surname, nor had he undertaken to refrain from so doing; that although the surname "Teofani" might be adapted to distinguish the goods of all persons taken collectively who bore that surname from the goods of other persons bearing a different name, it was not adapted to distinguish the goods manufactured by Teofani & Co., Limited, from those of other persons within the meaning of s. 9, par. 5, of the Act of 1905, and in particular from the goods of the applicant; that the name "Teofani" was not in its nature adapted to distinguish the goods of Teofani & Co., Limited, from those of other persons; and that even if it were in its nature adapted to distinguish as before mentioned, and the evidence established that it had become by user in fact distinctive, the registration thereof should not interfere with any bona fide use by the applicant of his own name and/or any bona fide description of the character and quality of the goods.

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shall within one month from sending to the registrar his case as aforesaid bring the matter before the Court by motion, and if he does not do so he shall be deemed to have withdrawn his application."

Rule 41. "If the application is accepted either by the Board of Trade or the Court it shall be advertised and proceedings thereafter shall be had in respect of it as if it had been accepted by the registrar in the ordinary course."

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A. Grant, K.C., and *A. S. Comyns Carr*, for the motion. The mark was registered in 1909 and was, it is submitted, allowed to go on the register per incuriam. The Board of Trade did not at that time appreciate what would be the effect of allowing such marks to be registered. Since that date, however, they have adopted a new practice and now refer to the Court the question whether the registrar should be directed to proceed with these applications to register.

This mark ought not to have been registered. If the application were now made to register it the Court would hold that the mark was not registrable, that is, that it was outside the category of "essential particulars" of a trade mark referred to in s. 9 of the Act. A surname of an individual is not adapted to distinguish his goods from those of another of the same name and is therefore under s. 9 not a registrable mark: *In re Pope's Electric Lamp Co.'s Applications* (1); *In re R. J. Lea, Ld.'s Application* (2); *In re William McEwan & Co., Ld.'s Application.* (2)

[WARRINGTON J. How can I take a mark off the register after it has been put there by the Board of Trade?]

An order of the Board of Trade directing the registrar to proceed with an application to register only removes one obstacle to registration. It is not a final determination that the mark is registrable. Under s. 35, sub-s. 2, the Court has jurisdiction to decide any question that it may be necessary or expedient to decide in connection with the rectification of the register. The question which the Court is now asked to decide as between the appellant and the respondent company is whether this mark ought to remain on the register. If the mark is one which was not capable of being registered, the fact that the Board of Trade have decided that it was is not final and conclusive of the matter. Although this mark may be distinctive it is not, it is submitted, registrable, except in a "special and particular manner" under s. 9, par. 5.

The entry of the mark is "wrongly remaining on the register" within s. 35, sub-s. 1, and the Court ought to direct it to be expunged. [They also referred to *In re Joseph Crosfield & Sons, Ld.*

(1) [1911] 2 Ch. 382. (2) [1912] 2 Ch. 32.

("*Perfection Soap*") (1); *In re Applications of W. & G. Du Cros, Ld.* (2); *In re Application of Benz et Cie. Rheinische Automobile-in-Motoren Fabrik Aktiengesellschaft* (3); and Kerly on Trade Marks, 3rd ed. p. 296.]

Colefax, K.C., and *F. H. Maugham*, for the respondent company. There is no evidence before the Court that the applicant is an aggrieved person within s. 35 of the Act.

The respondent company satisfied the Board of Trade that its mark was distinctive. The mark is now on the register and cannot be questioned. Under s. 9, par. 5, the Board of Trade and the Court are made alternative tribunals for determining the question whether a proposed mark is distinctive. The practice to be followed in making special applications under s. 9, par. 5, is prescribed by rr. 35—41 of the Trade Marks Rules, 1906. That practice was followed by the respondent company. The effect of the order made by the Board of Trade in the present case is shewn by r. 41, which provides that if the application is accepted by the Board of Trade it is to be advertised and proceedings thereafter are to be had in respect of it as if it had been accepted by the registrar in the ordinary course. Then r. 47 provides for the advertisement of the application, and r. 51 enables any person within one month from the date of the advertisement to give notice of opposition. The application in the present case was duly advertised, but no effective opposition was offered to the registration of the mark, and the mark was ultimately put upon the register. It was put on the register because the Board of Trade decided, and decided for all time, that it was to be deemed to be distinctive. The public by not coming in under the advertisement and objecting to the registration of the mark lost their right to do so, and the matter cannot now be questioned by any tribunal.

Further, there is no evidence here that the entry on the register was made without sufficient cause under s. 35, sub-s. 1. The authorities do not establish that every surname must necessarily be excluded from the category of registrable marks.

(1) [1910] 1 Ch. 130.
(2) [1912] 1 Ch. 644.
(3) [1912] W. N. 127; 29 Rep. Pat. Cas. 357.

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In *In re Whitfields Bedsteads, Ld.'s Application* (1) "Lawson Tait" was held to be a distinguishing mark. [They also referred to *In re Hjorth & Co.'s Application* (2) and *In re Itala Fabbrica di Automobili's Application.* (3)]

C. H. Sargant, for the Registrar of Trade Marks. The question whether the order of the Board of Trade ought to have been made is quite distinct from the question as to the result of the order when made.

There is no doubt that either the Court or the Board of Trade has jurisdiction to make an order under which a surname shall be deemed a registrable mark and dealt with accordingly. And after the passing of the Act of 1905 a good many orders were so made. But more recently there have been decisions of the Court to the effect that surnames are not in general desirable trade marks. And no doubt the Board of Trade will in future have regard to the views expressed by the Court, and would not in fact have made this order had the decisions in question been given previously.

Now as to the effect of the order. It is true that it is substantially in the form approved by Swinfen Eady J. in *In re Hjorth & Co.'s Application* (2); and there the learned judge expressed the view that such an order would not conclude the matter and that it would be necessary at a later stage to have a formal order that the mark be deemed a distinctive mark. But on the other hand in the later case of *In re Itala Fabbrica di Automobili's Application* (3) Parker J. declined to adopt this practice and thought it necessary to decide that the mark was to be deemed a distinctive mark in order to enable the registrar to proceed with the application. It is submitted that this is the truer view, and is more in accordance with r. 41 of the Trade Marks Rules, 1906, which under s. 60, sub-s. 2, of the Act have statutory force. The registrar cannot deal at all with the mark until the mark has been brought within the category of registrable trade marks by means of an order of the Court or the Board of Trade that he shall accept the application. But when once this order has been made, and the registrar has accepted the application, the mark

(1) [1909] 2 Ch. 373.
(2) (1910) 27 Rep. Pat. Cas. 461.
(3) (1910) 27 Rep. Pat. Cas. 493, 497.

has to be dealt with on the same footing as if it had been an ordinary mark not needing any special order and accepted by the registrar in the ordinary way. It would seem therefore that there was jurisdiction to register the mark, and the mere fact that a discretion was wrongly exercised is not a sufficient reason for removing the mark when once registered. In the "*Perfection*" *Soap Case* (1) the word "perfection" had been accepted as coming within the category of registrable marks, but on advertisement Lever Brothers came in and opposed, and as a result its registration as a mark was refused.

A. Grant, K.C., in reply.

WARRINGTON J. This is an application to remove a certain trade mark from the register. The facts are these. The trade mark was registered upon the application of a company called Teofani & Co., Limited. The mark is the word "Teofani"; and that word is the family name of one of the predecessors in business of the limited company. [His Lordship read the introductory words and par. 5 of s. 9 of the Trade Marks Act, 1905, and continued.] That is to say that a name is not to be within the category of the essential particulars of a trade mark unless a certain condition is fulfilled. In the present case the limited company succeeded in obtaining an order of the Board of Trade directing the registrar to proceed with its application. The effect of that order is shewn by r. 41 of the Trade Marks Rules, 1906. By r. 38 the registrar is to send particulars of the applicant's case to the Board of Trade. Then r. 39 provides: [His Lordship read rr. 39, 40, and 41, and continued.] In my judgment, the effect of the order of the Board of Trade which was made in this case is that which is referred to in r. 41, that is to say, the application is accepted; and when one goes back to s. 9, par. 5, it seems to me that that means that for the purposes of the application—I am using the words of Parker J. in *In re Itala Fabbrica di Automobili's Application* (2)—the mark is to be deemed to be a distinctive mark. That is to say that the Board of Trade, the competent tribunal for the purpose, have determined this at all events—

(1) [1910] 1 Ch. 130. (2) 27 Rep. Pat. Cas. 493, 497.

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TEOFANI & CO.'S TRADE MARK, *In re.*

that the name or the word in question is not outside the category of registrable marks. It may or may not be right to register it, but it is not outside the category; and the registrar is entitled to deal with it as within the category. Then the next step is that, this being a mark which the registrar is bound to accept, because the Board of Trade or the Court, as the case may be, has directed him to accept it, he has to proceed with the registration. He has to advertise the application, he has to consider evidence filed on behalf of the applicant, and he has to consider any opposition which may be made to it by any person who is entitled to object, and any evidence which may be filed on behalf of that person; and then, as the result of that, the registrar, who is for this purpose the competent tribunal, has to determine whether the name or word, as the case may be, is a distinctive mark. If he determines that it is a distinctive mark, it is then his duty to put it on the register. If he determines that it is not a distinctive mark—as was done in the "*Perfection*" *Soap Case* (1) by the Court—it is his duty to refuse to put it on the register. In the present case the order of the Board of Trade, as I have said, was made; the registrar then proceeded with the application; and, in the result, he put the mark upon the register. I am now asked to take it off, and the ground on which the case is put on behalf of the present applicant is that, having regard to the recent decisions of this Court, the Court, if the application were now made, would decide that the name "Teofani" was not capable of being a registrable mark; that it was outside the category of "essential particulars" of a trade mark. I do not say that it is, but it may be, for the Court has on several occasions decided that a particular name is outside the category of registrable marks. Whether, if this application had come before the Court, it would have so decided, I cannot say. It may be that it would; it may be that it would not; but, whether it would or not, it seems to me that the Court is precluded by the order made by the Board of Trade from now entertaining that question. It makes no difference whether the order in question has been made by the Board of Trade or by the Court. In either case it is made by a competent tribunal. Supposing, for

(1) *In re Joseph Crosfield & Sons, Ld.* [1910] 1 Ch. 130.

example, that this order had been made by one of the judges of the Chancery Division, could it for a moment be said that I could, on the strength of those authorities which have been cited, have not only overruled but reversed that decision by holding that the judge was wrong, and that the mark ought not to have been registered? If I could not reverse the decision of a Court of co-ordinate jurisdiction with myself, I cannot reverse the order of the Board of Trade, since the Board of Trade is as much a tribunal as the Court. Therefore I must take it that the order directing the registrar to proceed with the application, that is to say, the order which in effect determines that the mark was—I will only say this—not outside the category, is final and conclusive, and I cannot interfere with it.

Then the applicant proceeds to say—and he must say—that although the mark was not outside the category, yet the registrar was wrong in putting it upon the register. That is a question of fact, and that was determined by the registrar upon the evidence before him; and it is incumbent on the applicant to shew under s. 35 of the Act of 1905, which is the section enabling him to make the application, that the entry was made on the register without sufficient cause. The words "wrongly remaining on the register" do not seem to me to carry the matter any further. The applicant has to shew affirmatively that the entry was made on the register without sufficient cause. Now he has not adduced any evidence at all. His contention is that as a matter of law the entry was made without sufficient cause. As a matter of law that seems to me precluded by the order of the Board of Trade. I do not know what the facts before the registrar were; for anything that I know to the contrary he may have been right in putting the mark on the register. The result is that on these grounds I must refuse the motion, and refuse it with costs.

Solicitors: *Carter & Bell; McKenna & Co.; Solicitor to the Board of Trade.*

W. I. C.

C.A. 1912 May 13, 14; July 15.

In re SOLOMON.

NORE *v.* MEYER.

[1910 S. 222.]

Trustee — Investment — Mortgage — Breach of Trust — Insufficient Security — Property let on Weekly Tenancies—Duty of Trustees to inquire as to Nature of Property and Financial Position of Mortgagor—Valuer, Employment of —Duty of Trustees to inquire as to previous Dealings with Mortgagor— Duties of Valuer — Remuneration — "Two-thirds" Limit — Form of Report—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 8, *sub-s.* 1.

Appeal from Warrington J. (1)

This was an action claiming a declaration that an investment was a breach of trust; and that the defendants, who were executors and trustees, might be ordered to make good all loss occasioned thereby and by their neglect of certain mortgaged property; and that an account and inquiry might be directed with respect to a legacy.

Warrington J. dismissed the action, and the plaintiffs appealed.

Cave, K.C., Percy Wheeler, and *Gilbert Stone,* for the appellants.

H. Terrell, K.C., Buckmaster, K.C., and *Lyttelton Chubb,* for two of the defendants.

Clauson, K.C., and *J. Israel,* for the other defendant.

After two days had been occupied by argument the case stood over with a view to a compromise, and eventually an order was made by consent discharging the order of Warrington J. and substituting certain terms which had been agreed upon by the parties.

Solicitors: *J. T. Goddard; Farrar, Porter & Co.; Lewis & Yglesias.*

(1) [1912] 1 Ch. 261.

H. C. R.

PARKER J.
1912
Dec. 4.

In re MITCHELL.
FREELOVE *v.* MITCHELL.

[1912 M. 670.]

Principal and Surety—Right of Principal to Indemnity by Surety against Liability—Will—Construction—"Debts."

A surety's equitable right to be indemnified by the principal debtor does not create any debt before the surety has been called on to pay anything under his guarantee.

Held, accordingly, that a release of "all debts" to a principal debtor by the surety's will did not affect the right of the executors to come on the principal debtor's beneficial interest under the will for indemnity against claims under the guarantee made by the creditor after the testator's death.

Joseph Mitchell made his will, dated November 16, 1907, and clause 13 thereof was, so far as material, as follows: "I bequeath . . . . to my nephew John Joseph James Mitchell 2000*l.* and I forgive the said John Joseph James Mitchell all debts owing to me from him up to the time of my decease and all interest and arrears of interest thereon. And I bequeath to him the same and all documents which I shall hold by way of security for the same, but upon condition that he shall not be entitled to receive or retain the amount that shall be due from me to him up to the date of my death, whether for goods sold or upon any other account."

The testator appointed Mary Mitchell, H. Freelove, G. H. Long, and E. Vinter executors and trustees of the will, and died on July 7, 1911.

J. J. J. Mitchell was a nephew of the testator, and at the time of the death of the testator no sum was due from him to J. J. J. Mitchell for goods sold. The testator held various promissory notes from J. J. J. Mitchell, some of which were apparently statute-barred, but one of which, for 1000*l.*, was not so barred. In 1904 J. J. J. Mitchell had borrowed money from the Cambridge branch of Barclay & Co., Limited, bankers, and on September 26

PARKER J. 1912 MITCHELL, *In re.* FREELOVE *v.* MITCHELL.

the testator deposited with the bank the title deeds relating to certain properties to secure the advances made to J. J. J. Mitchell. On October 5, 1904, the testator gave to the bank a written guarantee, which was of a continuing nature, whereby he guaranteed to the bank all sums due by J. J. J. Mitchell, the testator's liability thereunder being limited to 4000*l.*

On October 29, 1908, some of the deeds deposited were returned to the testator, who, in substitution for them, deposited with the bank the title deeds relating to other property, and on the same day he gave to the bank another written guarantee, which was in substance to the same effect as the one previously given.

At the date of the testator's death the second guarantee was subsisting, the title deeds were still held by the bank, and money was due from J. J. J. Mitchell to the bank.

On July 12, 1911, the executors gave formal notice to the bank determining the guarantees, and on August 17, 1911, the bank demanded payment by the executors of 4000*l.* The executors paid the bank 3100*l.*, part of that amount.

On September 11, 1911, J. J. J. Mitchell executed a deed of assignment to trustees for the benefit of his creditors, and this deed was registered on September 15, 1911.

Freelove, Long, and Vinter, three of the executors and trustees, took out an originating summons against Mary Mitchell, the other trustee and executrix and also a beneficiary under the will, A. H. Mitchell, J. G. Mitchell, Kate Payne and Dorothy Payne, also beneficiaries thereunder, and E. G. Bell and C. Boardman, the trustees of the deed of assignment, for the determination of certain questions, one of which was whether, on the true construction of clause 13 of the will, the trustees and executors were entitled and ought to retain the amount of all or any payments made or to be made out of the testator's estate in respect of the guarantees and the charge (of September 26, 1904), "all of which were given by the testator as surety for the said John Joseph James Mitchell to Barclay & Co. Limited, together with interest, ... out of all or some and which of the interests given to the said John Joseph James Mitchell under the said will."

Under the will, besides the legacy and forgiveness above mentioned, J. J. J. Mitchell was entitled to one fifth of a sum of 3000*l.* in reversion and to one fourth of the residuary estate.

Wilfrid Hunt, for the plaintiffs, stated the facts and the question involved.

Romer, *K.C.*, and *T. J. C. Tomlin*, for Mary Mitchell. The forgiveness in clause 13 is confined to debts actually due and owing to the testator at the time of his death.

A surety has a right to come into equity for the purpose of being indemnified against a debt before he has paid anything himself; and Wickens V.-C. said that this right created an equitable debt: *Ferguson* v. *Gibson*. (1) Where an executor had become surety for his testator's debt, but before the testator's death had not been called on to pay anything in respect of the suretyship, Pearson J. held that nothing was due to him in respect of the suretyship—in other words that there was no debt—and that although he subsequently was called upon to pay, when no money of the testator was in his hands, he could not afterwards retain what he had paid: *In re Harrison*. (2) On the other hand, Kekewich J. held that the right of indemnity belonging to an executor who was surety for an unpaid debt of his testator created an equitable debt in respect of which he might exercise the right of retainer: *In re Giles*. (3) Where a testator had deposited money with a bank as a continuing security for money owing to the bank by his two sons, and by his will had given legacies to the sons, and at the testator's death the sons owed the bank more than the amount deposited, and, the sons having become bankrupt, the bank were about to appropriate the deposit in part payment of the sons' debt, North J. held that the trustees of the will were not entitled to retain the sons' legacies against the liability of the father's estate as surety: *In re Binns*. (4)

[PARKER J. The other cases you cited were apparently not referred to in that case.]

(1) (1872) L. R. 14 Eq. 379, 386.
(2) (1886) 32 Ch. D. 395.
(3) [1896] 1 Ch. 956.
(4) [1896] 2 Ch. 584.

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North J. seems to have been embarrassed by the rule in bankruptcy against double proof. The nature of the surety's right against the principal debtor has been recently explained by Swinfen Eady J. in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) The decisions shew that a mere right to be indemnified cannot be considered as a debt. [They also referred to *In re Akerman.* (2)]

T. Arnold Herbert, for beneficiaries in the same interest, adopted the same argument.

A. Grant, K.C., and *J. G. Wood,* for the trustees of J. J. J. Mitchell's deed of assignment. Clause 13 of the will is a complete gift by the testator of all debts, that is to say, all money claims or things which may ripen into money claims; and it makes a clean sheet between J. J. J. Mitchell and the testator. The contrary argument is an attempt to construe the word "debts" in a strictly common law sense.

The right of the surety to be indemnified is an equitable debt, and it is of such a nature that it justifies proceedings for indemnity and administration of the estate of the principal debtor: *Wooldridge* v. *Norris.* (3) The liability of the principal debtor is like the liability of a principal to indemnify his agent, which may be proved for in the administration of the principal debtor's estate: *Crowley's Claim.* (4) The mere allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment, that is to say, the surety's representative, although he has paid nothing, can maintain an action against a co-surety to compel him to contribute: *Wolmershausen* v. *Gullick.* (5) A surety who has a right of proof in bankruptcy in respect of his contingent liability is a "creditor" within the meaning of s. 48 of the Bankruptcy Act, 1883: *In re Paine* (6); *In re Blackpool Motor Car Co.* (7) *In re Giles* (8) is a distinct authority that the surety's right constitutes an equitable debt. An administrator who has joined with the intestate as surety in giving a security for loans has a right of

(1) [1909] 2 Ch. 401.
(2) [1891] 3 Ch. 212.
(3) (1868) L. R. 6 Eq. 410.
(4) (1874) L. R. 18 Eq. 182, 192.
(5) [1893] 2 Ch. 514.
(6) [1897] 1 Q. B. 122.
(7) [1901] 1 Ch. 77.
(8) [1896] 1 Ch. 956.

retainer, although he has not paid the loans: *In re Orme.* (1)
[They also referred to *Willes* v. *Greenhill* (*No.* 1). (2)]
[PARKER J. referred to *In re Sewell.* (3)]
T. J. C. Tomlin in reply.

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PARKER J. In this case I have to put a construction upon clause 13 of the will of the testator, who died on July 7, 1911, the will itself being dated November 16, 1907. The words of the clause are as follows: "I bequeath . . . . to my nephew John Joseph James Mitchell the sum of 2000*l.* and I forgive the said John Joseph James Mitchell all debts owing to me from him up to the time of my decease and all interest and arrears of interest thereon. And I bequeath to him the same and all documents which I shall hold by way of security for the same, but upon condition that he shall not be entitled to receive or retain the amount that shall be due from me to him up to the date of my death, whether for goods sold or upon any other account." At the date of the will the circumstances of the case were as follows. The testator held various promissory notes given to him by his nephew, John Joseph James Mitchell, some of which appear to be barred by the Statute of Limitations, but one of which was not so barred, namely, a note for 1000*l.* Further, it appears that in 1904 the nephew John Joseph James Mitchell had borrowed money from his bankers, and the testator had in the first instance deposited with the bankers certain securities or title deeds of his own to secure the advances to the nephew, and a day or two afterwards he entered into a guarantee, which was of a continuing nature, and guaranteed to the bank all sums due by the nephew to the bank, provided that the testator's liability under the guarantee should be limited to 4000*l.* Some years afterwards a second guarantee was given which is substantially to the same effect, the reason for giving it appearing to be that the testator placed some additional security with the bank for the purpose of covering his liability on the guarantee, and at the date of his death there was money due from the nephew to the bank, and the latter guarantee was still subsisting, the securities

(1) (1883) 50 L. T. 51. (2) (1860) 29 Beav. 376.
(3) [1909] 1 Ch. 806.

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or title deeds which had been deposited still remaining in the hands of the bank.

The question I have to decide is whether the clause in the will to which I have referred can be construed as a gift to the nephew of 4000*l.* or some other sum in aid of the money due by the nephew to the bank. That, of course, depends upon what construction I put upon the words "all debts" contained in the clause in question.

Now, I have heard a good deal of argument on the nature of the right which a surety has against the principal debtor, and I may say at once that it appears to me that, until the surety is called upon to pay and does pay something under his guarantee, there is no debt or right at law at all; until then, a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the creditor. That, I think, has long been well-known law, and at any rate it is made reasonably clear by the case, recently before Swinfen Eady J., of *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*(1)

I have also had various cases cited to me as to the position of an executor who has entered into a guarantee of the sort in question, with regard to his right of retainer, and those authorities do not appear to me to be entirely consistent. Fortunately, I have not in this case to decide any point as to retainer. In the cases which have been cited to me there are, however, expressions which seem to imply that there is in equity a debt due from the person who is guaranteed to the guarantor even before the guarantor has paid any money under the guarantee. That, I think, is merely a mode of expressing what the rights in equity are. There is no doubt that there is the right to come to equity for the purpose of obtaining the indemnity even before the money has been paid under the guarantee. It is possible to call that right an equitable debt, but as a matter of fact it does not appear to me to carry the matter any further by using that term. The right is not really a debt; it is a right to come, for the purpose of indemnity, to a Court of Equity.

If I look at the particular words used here, it appears to me that what the testator is really considering is debts in the proper sense of the word, that is to say, moneys actually due and owing,

(1) [1909] 2 Ch. 401.

capable too of carrying interest if such is the bargain between the parties, and not contingencies which may ripen at some future date, by reason of a number of events that may happen, into a debt at law or in equity in the ordinary sense of the word. It does not appear to me that the words are meant to include contingencies of this sort. It might be, for instance, that at the date of his death the testator had been called upon to pay, and had actually paid, money under the guarantee. In that case there would be no doubt that that would be a debt due from the principal debtor to the surety. On the other hand, he might not have been called upon to pay and might not have paid anything, and it does not follow at the date of his death that he must necessarily be called upon to pay or must necessarily pay anything; it might happen that the principal debtor might pay off the bankers' liability, and in that case there would never be any debt at all.

I hold, therefore, that in the present case the words "all debts" do not include any equitable right which the surety may have had at the time of his death to come into equity to obtain indemnity, and I do not think that that conclusion is disturbed in any way by the argument which I have heard from Mr. Grant and Mr. Wood, to the effect that the object of the clause was to make a clean sweep of all transactions between the testator and his nephew in order that the nephew might have a clear title to the 2000*l.* and the other bequests given to him by the will. The truth is that in these matters, when a surety gives his contract of guarantee to the bank, though he contemplates the possibility of being called upon to pay, he expects payment to be made by the principal debtor, and if the payment is made by the principal debtor, the liability of the surety never ripens into a debt at all. I do not think the testator in this case intended to include such matters as that in the release which he gave, and, that being the case, it appears to me that the release must be confined to the indebtedness of the testator in the stricter sense of the word, that is, so far as I have heard the facts, the moneys due upon the promissory notes, and does not include anything with reference to the guarantee.

There will be a declaration that the clause in the will does not

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extend to any moneys which the testator's estate may be called upon to pay to the bank under the guarantee, and that the executors are entitled to retain the beneficial interest of J. J. J. Mitchell under the will to make good those sums together with interest from the date of payment.

Solicitors for the plaintiffs and the defendant Mary Mitchell: *Mackrell & Ward, for Ernest Vinter, Cambridge.*

Solicitors for the other defendants: *P. J. Rutland; F. J. Perks, for T. Bates, Haverhill.*

F. E.

C. A.
1912
Nov. 6, 7, 28.

In re AVERY.
PINSENT *v.* AVERY.

[1909 A. 775.]

Revenue—Estate Duty—Incidence—Testator entitled to Reversionary Interest in Settled Fund—"Competent to dispose of"—Duty payable out of Settled Fund or Testator's Residue—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2; *s.* 6, *sub-s.* 2; *s.* 7, *sub-ss.* 6, 7; *s.* 8, *sub-ss.* 3, 4; *s.* 9, *sub-s.* 1; *s.* 22.

Under a settlement made in 1902 certain funds were vested in trustees upon trust for the testator for life and on his death for his widow for life, and subject thereto for the testator absolutely. By his will dated in 1907 the testator disposed of his interest in the settled funds. Upon his death in 1908, leaving his widow surviving, the question arose whether the estate duty upon the testator's reversionary interest in the settled funds was payable out of his residuary personal estate as testamentary expenses, or out of the settled funds:—

Held, reversing the decision of Warrington J., that as between the beneficiaries under the will the duty was payable out of the residuary personal estate.

In re Dixon [1902] 1 Ch. 248, overruled.

APPEAL from a decision of Warrington J.

By a settlement dated August 29, 1902, and made on the second marriage of Sir William Avery certain securities of the value of about 50,000*l.* were vested in trustees upon trust to pay the income to Sir William Avery for life, and after his death to his widow, in case she should survive him, for her life, and after her death to stand possessed of the settled funds upon trust for Sir William Avery absolutely. There was issue of the said marriage

two children only, namely, two daughters who were infants and unmarried. By his first wife Sir William Avery had only one child, namely, the defendant Sir William Eric Thomas Avery, who was born in 1890.

By his will, dated in 1907, Sir William Avery appointed the plaintiffs to be executors and trustees thereof, and he thereby confirmed the settlement of 1902. He further thereby made a provision for his then wife, whom he married in 1902, and his two daughters by her, by constituting a fund which he called his "wife's trust fund," and directed his trustees to stand possessed of the same upon trust to pay the income to his wife until her death or remarriage, whichever should first happen, and after her death upon trust as to both capital and income for his children by his then present marriage and their issue as therein mentioned, and upon the failure or determination of those trusts the testator directed that his wife's trust fund should be held upon the trusts of his residuary estate. He then devised and bequeathed all his real and personal property not thereby otherwise disposed of upon trust for his son Sir William Eric Thomas Avery when he should attain the age of twenty-five years absolutely, and in case his said son should die in his lifetime or under the age of twenty-five years leaving children then upon trust for such children, and in the event of there being no such children then upon the further trusts therein declared. The will also contained a provision that the testator's testamentary expenses should be borne by the general residue of his estate. By a codicil dated July 24, 1908, he made certain variations in the amount of his "wife's trust fund," and he made further provision in favour of his two daughters in these terms: "I direct my trustees or trustee"—that was the trustees of his will—"as soon as conveniently possible after the death of my said wife to set aside out of the trust funds comprised in and held upon the trusts of the said settlement or the proceeds thereof such a sum or such several sums or such investment or investments as shall in the opinion of my trustees or trustee (whose decision shall be final and absolute) be sufficient to make the value of the share of my wife's trust fund (as defined by my said will and this codicil) which under the

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trusts thereof are to be held for each child of mine by my present marriage or for the issue of each such child up to 50,000*l.*"

The testator died on October 28, 1908, leaving his widow, his son, and his two daughters surviving. The question then arose whether the estate duty upon his reversionary interest in the settled funds was payable out of his residuary personal estate as testamentary expenses, or out of the settled funds. It appeared that in order to make up the share in his "wife's trust fund" of each of the two children of the testator's second marriage to 50,000*l.* as directed by the codicil it would be necessary to exhaust the whole of the settled funds; it was therefore to the interest of those children to throw upon the general estate of the testator as large a proportion of the duties as possible.

On December 20, 1911, a summons was accordingly taken out in this action by the guardian ad litem of the two daughters claiming a declaration that the estate duty which upon the death of the testator became payable in respect of the testator's reversionary interest under the settlement was under the provisions of the Finance Act, 1894, or, alternatively, upon the true construction of the testator's will and codicil, payable out of his residuary estate, and was not charged upon or payable out of the settled funds.

Warrington J. held, following *In re Dixon* (1), that the duty must be borne by the settled funds. The testator's daughters appealed.

Danckwerts, K.C., and *Maugham*, for the appellants. The liability to pay estate duty in respect of the testator's reversionary interest in the settled funds is thrown upon the residue both by the Finance Act, 1894, and by the specific direction contained in the will. The will directs that the testator's funeral and testamentary expenses shall be paid out of residue. This reversionary interest belonged to the testator absolutely, and he was "competent to dispose" of it at his death. It therefore comes within the words of s. 6, sub-s. 2, of the Act, which directs the executor to pay "the

(1) [1902] 1 Ch. 248.

estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death," and of s. 8, sub-s. 3, which uses the same words in stating what duty the executor must account for. Sect. 9, sub-s. 1, is the only section which enables the executor to throw the burden of the duty upon any one else, and it does not apply here, for it only charges a rateable part of the duty upon property "which does not pass to the executor as such." Sect. 22, sub-s. 1 (*l*), defines "property passing on the death" to include property "passing either immediately on the death or after any interval, either certainly or contingently." The testator's reversionary interest therefore clearly passed on his death. Sect. 1 of the Act contains the grant of the duty; s. 2 defines what is meant by "competent to dispose"; s. 6, sub-s. 1, declares that the duty is a stamp duty; s. 6, sub-s. 2, makes the executors liable to pay on delivery of the Inland Revenue affidavit, and the meaning of that phrase is defined in s. 22, sub-s. 1 (*n*); s. 7, sub-s. 6, gives the person accountable for the duty an option, where an interest includes an interest in expectancy, to pay either at the testator's death or when the interest falls into possession. There is nothing in any of these sections to relieve the executor from the liability plainly thrown on him by s. 6, sub-s. 2, to account for the duty on a reversionary interest of the testator's which plainly passed on his death, because the interest was settled. Sect. 8, sub-s. 4, makes the trustees of settled property liable, but only for property for which the executor is not accountable, and s. 9, sub-s. 1, gives a charge for the duty on property "which does not pass to the executor as such." Neither of those sections can apply to this case. Warrington J. has held that what passed on the death was the whole settled fund and that it did not pass to the executor. That view is untenable and is inconsistent with *Winans* v. *Attorney-General* (No. 2) (1), where Lord Shaw points out in his judgment that the duty is payable upon all property of the testator not specially excepted and is of the nature of probate duty; and with *In re Hadley* (2), which decided that property passing under a general power of appointment was subject to duty, following the decision of Buckley J. (as he then was) in

(1) [1910] A. C. 27. (2) [1909] 1 Ch. 20.

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In re Moore. (1) In *In re Gray* (2) it was decided that where the executors took the testator's general estate the duty on a sum of money which the testator had covenanted to pay to the trustees of a settlement must be paid by the executors and not by the trustees. In *In re Morrison* (3) Parker J. said it was a matter of ordinary knowledge that estate duty was an administration expense. [They also referred to *In re Dowager Duchess of Manchester.* (4)]

Clauson, K.C., and *E. Knowles Corrie*, for the residuary legatees. The Inland Revenue authorities are claiming duty on the whole capital value of the settled funds. The life estate of Lady Avery and the reversion of the testator both passed on the death. If the estate duty is paid by the trustees out of the capital of the settled fund the beneficial interests of the testator and Lady Avery will bear the duty in proper proportions, and there is no other way in which this can be provided for. The trustees are liable to pay under s. 8, sub-s. 4. Sect. 1 makes the duty payable on the whole settled fund, not merely on the reversionary interest of the testator. By s. 6, sub-s. 2, the executor is to pay upon what the testator could dispose of, but he could not dispose of the settled fund, and therefore the duty is not payable by the executors, but by the persons made accountable by s. 6, sub-s. 4, i.e., the trustees.

It may be that the executors are liable to pay duty on the reversionary interest according to its value as determined under s. 7, but they have an option to postpone the payment of duty until the interest falls into possession, and this option they have exercised. The trustees are liable to pay at once, and on the whole settled fund, and s. 5, sub-s. 2, and s. 7, sub-s. 10, prevent the duty being paid twice. The value of the reversion must be brought in for the purpose of ascertaining the aggregate value of the estate, but if the payment by the executors is postponed and the whole duty is paid by the trustees, the duty on the reversionary interest will not be payable. The duty for which the trustees are liable is not the same as that for which the executors are liable, and the executors are not accountable

(1) [1901] 1 Ch. 691.
(2) [1896] 1 Ch. 620.
(3) (1910) 102 L. T. 530.
(4) [1912] 1 Ch. 540.

for the duty upon the whole settled fund, for which the trustees are liable.

It has been admitted that Lady Avery is bound to pay duty on her life interest, but there is no machinery in the Act for ascertaining the amount of the duty or making Lady Avery or any one else pay it. The scheme of the Act is to deal with the duty as a whole, not to divide it up between particular interests.

As to the argument on the will, if the executors have to pay the duty, we admit it is a testamentary expense, but it never can be so if the trustees have to pay it: *In re Dixon* (1); *Inland Revenue Commissioners* v. *Priestley*. (2)

H. E. Wright, for the plaintiffs, the trustees.

Nov. 28. COZENS-HARDY M.R. Under a settlement made on the second marriage of the testator, securities of the value of upwards of 50,000*l*. were vested in trustees upon trust for the testator for life and on his death for his widow for life and subject thereto upon trust for the testator absolutely. He died in 1908, and his widow is still living. Under his will, which it is not necessary to refer to in detail, it is to the interest of his two daughters to contend that estate duty, or part of the estate duty, payable in respect of the settled fund should be paid out of his residuary personal estate as testamentary expenses. The residuary legatee, on the other hand, contends that it is payable out of the settled fund. Warrington J., following a decision of Buckley J. in *In re Dixon* (1), has held in favour of the residuary legatee. It is necessary to consider several sections of the Finance Act, 1894.

Now it is perfectly clear that the reversionary interest in the settled fund formed part of the testator's estate which he was competent to dispose of at his death, and which he did in fact dispose of by his will. By s. 6, sub-s. 2, there is a positive obligation imposed upon the executors before obtaining probate to pay the estate duty in respect of all personal property of which the testator was competent to dispose. This obligation seems to be absolute, although by virtue of s. 7, sub-s. 6, there is an option in the executor to postpone payment in respect of this

(1) [1902] 1 Ch. 248. (2) [1901] A. C. 208.

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reversionary interest until it falls into possession. Sect. 8, sub-s. 3, makes this obligation still more clear. There are provisions in the Act, to which I need not more fully refer, for ascertaining the value of an expectant or reversionary interest. It is sought by the residuary legatee to evade this obligation by alleging that the Crown on the testator's death could claim estate duty on the entirety of the settled fund, and for this purpose s. 8, sub-s. 4, is relied upon. This does not seem to me to conclude the matter. The Crown may have a right to proceed against the trustees of the settlement. As to this, I say nothing. The only question before us is as to the rights of the beneficiaries under the testator's will. I feel no doubt that the duty payable by the executors pursuant to their obligation in respect of the reversion must be treated as estate duty payable in respect of the whole settled property, for it is impossible to suggest that the Crown could first get duty in respect of part and afterwards claim duty in respect of the entirety. The case of *Inland Revenue Commissioners* v. *Priestley* (1) is an important authority on this point. The limitations there were in substance identical with the limitations in the present case. The executors of the person competent to dispose of the capital subject to a life interest paid estate duty in respect of the settled property as being property of which the testator was competent to dispose at his death. The Commissioners took the market value of the settled property and made an allowance in respect of the life interest. This duty having been paid by the executors, it was held that no further estate duty was payable on the subsequent death of the tenant for life (see s. 5, sub-s. 2), and several of the noble Lords, and especially Lord Macnaghten, expressed the view that the executors were properly charged with and were the only persons liable to pay estate duty in respect of the settled property. With the utmost respect to Buckley J., I am unable to assent to the view that the duty payable in respect of the settled fund "is not the duty, and does not include the duty or any part of the duty, in respect of the deceased's interest in the reversionary interest": *In re Dixon*. (2) This seems inconsistent with the view of the House of Lords in the above case.

(1) [1901] A. C. 208. (2) [1902] 1 Ch. 256.

In my opinion the judgment of Warrington J., who followed most properly the judgment of Buckley J., is incorrect. I think the appeal should be allowed so far as it asks that estate duty payable in respect of the testator's reversionary interest ought, as between the beneficiaries under his will, to be paid out of his residuary estate.

FARWELL L.J. Under a settlement made on August 29, 1902, the testator was entitled to a life interest in a sum of 50,000*l.* or thereabouts, vested in trustees; after his death his widow was entitled to a life interest therein, and on her death the fund became the testator's absolutely. The testator died on October 28, 1908, and thereupon the 50,000*l.* "passed on his death" within s. 1 of the Finance Act, 1894, as to the life interest to the widow, and as to the reversion to his executors as part of his estate. The widow is ready and willing and offers to pay the duty on her life interest, and the executors are clearly liable to pay the duty on the reversion as being personal property of which the deceased was competent to dispose at his death within s. 6, sub-s. 2, unless they elect to postpone payment under s. 7, sub-s. 6. Neither the widow nor the trustees of the settlement are liable to pay this duty, because this is not, under sub-s. 4 of s. 8, property passing on the death of the deceased where "the executor is not accountable" for the duty; the executors are clearly accountable. The question before us is between beneficiaries, whether the persons claiming under the testator's will have any right at law or in equity to throw the burden imposed on the executors by the statute upon the settled fund in relief of the testator's estate, and I am of opinion that they have none. Warrington J. has taken the contrary view on the ground that the property that passed on the death was not the reversionary interest, but the settled fund. I am unable to agree with him; the settled fund remains where it was, vested in the trustees; the property that has passed is twofold, the life interest and the reversion; and Warrington J.'s judgment is in direct conflict with Lord Shaw's speech in *Winans* v. *Attorney-General* (No. 2) (1), where that noble and learned Lord

(1) [1910] A. C. 27, 47.

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points out the difference between legacy duty and estate duty, and says: "Estate duty is of a different character; the levy and payment thereof occur not at the point of accession to property, but of the passing of property by the death of a testator." It is quite clear that this reversionary interest was part of the testator's estate vested in the executors, who were bound to deal with it as such, for example, by selling it for the payment of debts if necessary, and who could sue the trustees in respect of it if it were in jeopardy. It has to be included in the executors' affidavit for probate, and is in every sense part of the testator's estate from the moment of his death. I venture, with all respect, to think that there is an oversight in Buckley J.'s judgment in *In re Dixon.* (1) He points out quite accurately that the reversionary interest of A. expectant on B.'s death is property part of A.'s estate passing upon his death, but he omits to give effect to this in his subsequent observations. I am unable to agree with the conclusion at which he arrived, which is in my opinion inconsistent with the judgment of the House of Lords in *Inland Revenue Commissioners* v. *Priestley.* (2) Nothing that I have said is intended to suggest that the trustees would be safe in paying over the trust funds to the executors on the death of the tenant for life without being satisfied that all duty has been paid, and I express no opinion on the question whether the trustees could be compelled by the Crown to raise and pay the duty at once if the executors desired to postpone payment under s. 7. The appeal must be allowed.

HAMILTON L.J. I am of the same opinion. The appellants' notice of appeal asks that the declaration made by Warrington J. may be varied, and that it may be declared "that the estate duty, which upon the death of the testator became payable in respect of the testator's interest in the settled funds, is payable out of the estate of the testator, and is not a charge upon or payable out of the settled funds."

Warrington J. made a declaration, following *In re Dixon* (1), that "the estate duty, which upon the death of the testator became

(1) [1902] 1 Ch. 248, 255. (2) [1901] A. C. 208.

payable in respect of the funds settled . . . . is . . . . a charge upon and payable out of the settled funds and not out of the testator's residuary estate." There is no cross-appeal.

At the time of his death the testator was entitled, in reversion expectant upon the death of his widow, who survived him, to the whole interest in the settled fund in question. He was "competent to dispose of" this interest; he did dispose of it by his will, and it was "property passing on his death," by the combined operation of s. 1 and s. 2 (*a*) of the Finance Act, 1894. How this interest has been valued we do not know. How it ought to be valued we have not to say. We are given to understand that the executors have elected not to pay any duty in respect of it till the reversion falls into possession. Under the Finance Act, 1894, s. 6, sub-s. 2, the executors came under a statutory obligation to pay estate duty upon the settled property on delivering the Inland Revenue affidavit, because, the testator being entitled to the whole of it in reversion, he was competent to dispose of it subject to the life interest, and in fact it passed on his death. It is under s. 7, sub-s. 6, that they enjoy the right to postpone payment, which they have exercised. Whatever they pay in respect of this estate duty will, when they pay it, be a testamentary expense payable out of residuary estate. It is said that s. 8, sub-s. 4, prevents this, and that the tenant for life, or alternatively the trustees of the settled fund, are liable for estate duty on the whole settled fund presently, whence it is said to follow that the executors are not liable. I think this argument inverts the subsection. This alternative liability only arises where (1.) property passes on the death of the deceased, and (2.) his executor is not accountable in respect of such property. Questions have been raised in argument before us as to the possible liability of the trustees of the settled fund, if the Commissioners of Inland Revenue should claim estate duty from them in spite of the fact that the testator's executors have been rightly treated as accountable. *Inland Revenue Commissioners* v. *Priestley* (1) appears to conclude this in favour of the trustees, but we are not called upon to decide the point.

I agree in what has been said with regard to the decision in the

(1) [1901] A. C. 208.

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case of *In re Dixon* (1), and only desire to point out that neither *Inland Revenue Commissioners* v. *Priestley* (2) nor *Attorney-General* v. *Dodington* (3) appears from the report to have been brought to the learned judge's attention.

Solicitors: *Dixon, Weld & Co.; Stow, Preston & Lyttelton; Field, Roscoe & Co., for Pinsent & Co., Birmingham.*

G. A. S.

C. A. 1912 NEVILLE J. *Nov.* 27. C. A. *Dec.* 9, 10.

In re PACAYA RUBBER AND PRODUCE COMPANY, LIMITED.

[0026 of 1912.]

Company — Winding-up — Pending Action in King's Bench Division — The Company and other Parties Defendants — Fraud alleged — Transfer to Winding-up Court — Practice — Companies (Winding-up) Rules, 1909, *rr.* 2, 42—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 142.

Rule 42 of the Companies (Winding-up) Rules, 1909, which empowers the judge of the winding-up Court to transfer to that Court any action by or against a company which, at the date of the winding-up, is pending in any other Court, extends to actions in which other parties as well as the company are defendants.

So *held* by the Court of Appeal, affirming the decision of Neville J.

Where, therefore, at the date of the liquidation an action was pending in the King's Bench Division against the company, its directors and promoters, to set aside an agreement on the ground of misrepresentation and fraud, and the plaintiffs in the action obtained leave under s. 142 of the Companies (Consolidation) Act, 1908, to continue the action against the company, and subsequently after close of pleadings set it down for trial with a jury, the judge of the winding-up Court in the exercise of his discretion under r. 42, and, on the application of the liquidator and with the consent of the defendant directors and promoters, transferred the action to that Court notwithstanding the opposition of the plaintiffs, and the Court of Appeal refused to interfere with the exercise of his discretion.

ADJOURNED SUMMONS.

The above-named company was formed in February, 1910, to acquire certain rubber estates.

In October and November, 1910, five actions were commenced

(1) [1902] 1 Ch. 248. (2) [1901] A. C. 208.
(3) [1897] 2 Q. B. 373.

by shareholders against the company, its directors and promoters, claiming rescission of their contracts to take shares in the company and consequential relief on the ground of material and fraudulent misrepresentations in the prospectus of the company, and the plaintiffs in the five actions were the committee of a shareholders' association formed to investigate the affairs of the company. In March, 1911, negotiations ensued between the defendants and the committee for the compromise of the five actions, and eventually by a written agreement dated May 17, 1911, and made between the defendants of the one part and the committee of the other part, it was agreed that the five actions should be compromised by order of the Court, and by consent should be discontinued upon the terms and conditions embodied in the agreement. The five actions were accordingly discontinued by consent orders on May 19, 1911.

In September, 1911, the action of *Jones and Others* v. *The Pacaya Rubber and Produce Company, Limited and Others* [1911 J. 1672] was commenced in the King's Bench Division by the same plaintiffs against the same defendants, claiming to set aside the compromise agreement of May 17, 1911, on the ground that it was obtained by misrepresentation and fraud; alternatively, that it was void by reason of the defendants' breach of its essential conditions, and asking that the orders discontinuing the five actions might be set aside.

On October 25, 1911, the plaintiffs on a summons for directions obtained an order for a jury. On November 29, 1911, the statement of claim was delivered, and the action was pending when on February 7, 1912, the company was ordered to be wound up compulsorily and a liquidator was appointed. The company was insolvent.

On June 7, 1912, the plaintiffs in the pending action obtained an order in the winding-up giving them leave notwithstanding the order of February 7, 1912, to continue that action as against the company on condition that no execution should be issued against the company under any judgment or order obtained in the action without the leave of the Court. On July 12, the pleadings in the action being closed, the plaintiffs gave notice of trial for July 27 with a judge and special jury.

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On July 12 the liquidator issued a summons in the winding-up for an order that all further proceedings in the pending action in the King's Bench Division might be transferred to the Chancery Division and might be assigned to the judge for the time being exercising the jurisdiction to wind up companies.

The summons was heard before Neville J. on November 27, 1912.

Jenkins, K.C., and *Whinney*, for the liquidator. The action is one which before the Judicature Act, 1873, would have been brought in the Court of Chancery, and is by s. 34 of that Act included in the class of business assigned to the Chancery Division, although no doubt under s. 36 of the Act it could be retained in the King's Bench Division. The action was automatically stayed by s. 142 of the Companies (Consolidation) Act, 1908, and the application is made under r. 42 of the Companies (Winding-up) Rules, 1909. (1) We ask the Court in the exercise of its discretion under the Rules to transfer the

(1) The Companies (Winding-up) Rules, 1909, r. 2, defines "Court" to mean "the Court which has jurisdiction to wind up the company"; and "judge" to mean "the judge who for the time being exercises the jurisdiction of the High Court to wind up companies."

Rule 42: "(1.) Where an order has been made in the High Court for the winding-up of a company the judge shall have power, without further consent, to order the transfer to him of any action, cause or matter pending in any other Court or Division brought or continued by or against the company, and any action or proceeding by a mortgagee or debenture-holder of the company against the company, for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against the company's assets or property, which is pending in the High Court or before any judge thereof shall without further order be transferred to the judge of the High Court. In the case of applications in chambers in actions so transferred, where the practice in winding-up is different from the practice in the Chancery Division, the practice in winding-up shall prevail.

"(2.) Where any action brought by or against a company against which a winding-up order has been made is transferred to the judge of the High Court, the registrar may under the general or special directions of the judge, hear, determine and deal with any application, matter, or proceeding which, if the action had not been transferred, would have been determined in chambers. These provisions shall apply to the proceedings in any action in which by the Rules of the Supreme Court or otherwise the chamber proceedings are directed to be dealt with by the registrar."

action to the winding-up Court. The other defendants do not object. The order for a jury was only a formal order on a summons for directions made immediately after the writ was issued and will automatically go if the action is transferred to this Court. It is essentially an action to be tried in this Court. The company is the principal defendant. The other defendants are nominal defendants and no damages are claimed against them. The essential conditions of the compromise alleged to have been broken were to be performed by the company. If the plaintiffs do not succeed the other five actions in the King's Bench Division will not be reopened. There is no direct authority on the point, and we ask the Court in the exercise of its discretion to transfer the action. [Order xxxvi., rr. 1—8, were also referred to.]

Drucquer, for the defendant directors and promoters, consented to the transfer of the action.

Colam, K.C., and *E. G. Palmer*, for the plaintiffs. It is submitted (1.) that there is no jurisdiction under r. 42 to transfer this action; and (2.) that, if there is jurisdiction, the Court in the exercise of its discretion will not make the order. In the first place, r. 42 (1.) reproduces r. 14 (1.) of the Winding-up Rules, 1892. Before then there was no jurisdiction to transfer such an action as this, and the rule must be strictly construed. On its true construction it confers jurisdiction to transfer where the company is the sole plaintiff or defendant and does not apply to cases where there are other parties defendant besides the company. The statement of claim shews that relief against the company would be fruitless and that there is a substantial claim against the other defendants, two of whom were the promoters of the company.

[Neville J. Here the other defendants consent to a transfer.]

It is submitted that the consent of the plaintiffs is also necessary, and that they cannot be deprived of the tribunal they have chosen. The practice that obtained before the rule still exists and should be enforced. The Court would not make an order to stay where other parties were defendants: *Hall* v. *Old Talargoch Lead Mining Co.* (1); *In re New Zealand Banking*

(1) (1876) 3 Ch. D. 749.

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Co. (1); *McEwen* v. *London, Bombay and Mediterranean Bank, Ltd.* (2); *In re Rio Grande Do Sul Steamship Co.* (3) Secondly, assuming the Court has jurisdiction, the action is based on allegations of fraud, and the plaintiffs are entitled to have that issue of fact submitted to a jury : *Pearson & Son, Ltd.* v. *Dublin Corporation* (4); Order XXXIII., rr. 3, 6. The liquidator is not entitled as of right to the order, and it is submitted that the Court in the exercise of its discretion will not make it: *Moss* v. *Bradburn* (5); *Victoria Mutual Assurance Society* v. *Smith.* (6)

Jenkins, K.C., in reply.

NEVILLE J. The first point I have to deal with is as to the jurisdiction of the Court under r. 42 to order the transfer of an action to the winding-up Court. It is said that the rule only applies to cases where the company is the sole plaintiff or defendant and does not extend to cases where the action is not against the company alone but against the company and other defendants. In my opinion the rule covers both classes of cases, but of course there may be many cases in which there are other defendants besides the company where it would not be right for the Court to order the transfer. Having then the jurisdiction, ought I to exercise it in the present case?

Now it is not a case so obvious that one can say there is no difficulty in exercising the discretion. I think there is. But it seems to me that r. 42 indicates that, prima facie, actions against a company should be transferred to the winding-up Court, and here we have a case which I think is very proper to be tried by the winding-up Court. It is an action in respect of matters assigned to the Chancery Division, and although fraud is alleged the defendants against whom the fraud is alleged consent to the transfer of the action. Therefore I think the argument that it is undesirable to withdraw from the consideration of a jury any case in which fraud is alleged has little force in the present case. Nor do I think in any case the Chancery Division is disposed to accept the view that it is a

(1) (1869) 21 L. T. 481.
(2) (1867) 15 L. T. 495.
(3) (1877) 5 Ch. D. 282.
(4) [1907] A. C. 351, 356.
(5) (1884) 32 W. R. 368.
(6) (1889) 5 Times L. R. 182.

tribunal unfitted to deal with allegations of fraud, because under its present constitution it is, and its predecessor the Court of Chancery always was, largely concerned with cases of the kind. I think on the whole that in this case I ought to make the order for transfer, and I do so. The costs will be costs in the action.

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Leave to appeal was granted.

H. L. F.

C. A.

The plaintiffs appealed. The appeal was heard on December 9, 1912.

Colam, K.C., and *E. G. Palmer*, for the plaintiffs, argued as in the Court below.

Clauson, K.C., and *Whinney*, for the liquidator, and *Drucquer*, for the defendant directors and promoters, were not called upon to argue.

Dec. 10. BUCKLEY L.J. On September 26, 1911, there was commenced in the King's Bench Division an action of *Jones and Others* v. *The Pacaya Rubber and Produce Company, Limited* [1911 J. 1672]. Its object was to set aside an agreement of compromise of May 17, 1911, made between the company, its directors, and the plaintiffs, on the ground that it had been obtained by fraud and misrepresentation. It is an action of a class assigned to the Chancery Division by s. 34, sub-s. 3, of the Judicature Act, 1873. The action, however, was brought in the King's Bench Division. It could have been retained and tried in the King's Bench Division under s. 36 of the Act. It involved charges of fraud, and it was intended to try it with a jury. On February 7, 1912, the company was ordered to be compulsorily wound up. The effect of this was that under s. 142 of the Companies (Consolidation) Act, 1908, the action was automatically stayed, unless and until leave to proceed with it was given. Application was made for leave to continue the action, and on June 7, 1912, leave was given to the plaintiffs to proceed notwithstanding the winding-up order. That order was right, for the cancellation of the agreement which the plaintiffs sought could not have been obtained in the winding-up proceedings, but

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only in the action. Afterwards, application was made to transfer the action to the judge exercising for the time being the jurisdiction of the Court in the winding-up of companies. The question is whether an order made by the judge transferring it to himself is right. The predecessor of the present r. 42 of 1909 was r. 14 of the Companies (Winding-up) Rules, 1892. The first part of that rule was similar to the first part of the present rule, but the rule of 1892 contained a proviso forbidding the transfer of actions by mortgagees or debenture-holders. The reason for that was that debenture-holders were treated as persons standing outside the winding-up jurisdiction, and it was not thought right that they should be prejudiced in taking proceedings to enforce their security. The new rule, r. 42 of 1909, omits that proviso and adds the provision that "any action or proceeding by a mortgagee or debenture-holder of the company against the company, for the purpose of realising his security, ... which is pending in the High Court or before any judge thereof shall without further order be transferred to the judge of the High Court." Even debenture-holders' actions therefore are now and without the making of a special order brought under the winding-up jurisdiction. The intention of the rule (and the more emphatically so in its new form) is that all litigation affecting a company's assets may be brought before the judge having winding-up jurisdiction. It is, however, argued that the rule does not include actions brought against a company and other persons as co-defendants; that in such a case there is no jurisdiction to transfer. It is not necessary to say much to displace this argument. If it were well founded, it would enable a party who did not wish the action to be transferred to attain his object by merely adding other defendants—bogus or otherwise. An action is equally an action against the company when others are joined as co-defendants. In the present case the action is brought to set aside an agreement to which the company and others are parties. This is an action within the rule. But it is said that there are charges of fraud, and that the action has been set down for trial before a special jury, and that is the proper tribunal for the trial of such a case. No doubt this is a consideration which ought to weigh with the judge in determining

how to exercise his discretion. The fact is, however, that in the present case the general proposition that a person accused of fraud ought not to be deprived of a jury has no application, for the defendant directors, who are accused of the fraud, consent to the transfer of the action to the winding-up Court and do not wish for a trial by jury. I think that Neville J. exercised his discretion rightly in transferring the cause to its own Division. Any question of fraud can be tried there equally as well as in the King's Bench Division. This appeal must be dismissed with costs.

KENNEDY L.J. I am of the same opinion, and am content to say that it is not disputed that Neville J. had jurisdiction to make the order in question, that is to say, that he had a discretion to make the order which he has made; and I, for one, should be very slow in such a case to reverse his decision. It is not suggested that there was not material upon which he could come to the conclusion to which he has come, and it would take a much stronger case than the present one to induce me to overrule the conclusion at which he has arrived. As regards the charge of fraud, if the directors had taken up the position that it was a serious charge, which they wished to be tried by a jury, I should have come to a different conclusion, for it would be right to have a trial by jury in such a case. But that is not this case, for the directors desire the mode of trial which the judge's order gives them. It is the plaintiffs who desire to have the charge of fraud tried by a jury, but that desire does not prompt me to give effect to it in a case of this nature. The learned judge had a discretion, and I fail to see that it was wrongly exercised.

Appeal dismissed.

Solicitors: *Mills, Curry & Gaskell; Torr & Co.; Jenkins, Baker, Reynolds & Co.*

W. J. B.

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Nov. 26;
Dec. 10.

In re DOECHAM GLOVES, LIMITED.

[00358 of 1912.]

Company—Scheme of Arrangement—Increase of Capital—Reorganization of Share Capital—Alteration of Rights defined by Memorandum—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 45, 120.

A scheme of arrangement which alters any rights defined by the memorandum of association must satisfy the conditions laid down by s. 45 of the Companies (Consolidation) Act, 1908, although the scheme does not include the consolidation of different classes of shares or the division of shares into shares of different classes.

In re Palace Hotel, Ld. [1912] 2 Ch. 438, not followed.

Doecham Gloves, Limited, was incorporated on February 1, 1912, with the object of entering into an agreement with a French company whereby the English company acquired a right to take the whole or any part of the glove skins manufactured by the French company and to use the trade mark Doecham, and of manufacturing and dealing in gloves, glove skins, and accessories.

Clause 5 of the memorandum of association was: "The capital of the company is 90,000*l.* divided into 200,000 cumulative participating preference shares of five shillings each and 800,000 ordinary shares of one shilling each. The preference shares are cumulative and preferential both as to interest and repayment of capital. The profits of the company shall be dealt with as follows:—

"(*a*) Ten per cent. shall be placed to a reserve account; (*b*) 7½ per cent. shall be paid by way of cumulative dividend on the nominal amount of the preference shares; (*c*) out of the balance of profits the holders of the ordinary shares shall be entitled to be paid a sum not exceeding 40,000*l.* which shall be distributed among them pro rata; (*d*) such further sum shall be carried forward to the next year's account as the directors shall determine; (*e*) any balance of profit shall be paid as to 10 per cent. to the holders of the preference shares pro rata, as to 50 per cent. to the holders of the ordinary shares pro rata, and as to 40 per cent. to the members of the board of directors.

"Any surplus assets of the company after repayment of the capital paid up on the preference and ordinary shares shall be divided in the manner provided by sub-clause (*e*) as to the division of any balance of profit."

The articles of association of the company adopted Table A with modifications.

The company having an opportunity of increasing its capital to 200,000*l.* by issuing new preference shares, provided that the division of surplus profits provided for by clause 5 (*e*) of the memorandum of association were modified, applied to the Court to direct the holding of meetings under s. 120 of the Companies (Consolidation) Act, 1908. No ordinary shares of the company had been issued. On October 21, 1912, the Court made an order that the company should convene separate meetings of (1.) the company, (2.) the preference shareholders, (3.) such shareholders of the company as were directors of the company, to consider and, if approved, pass the following resolutions :—

(1.) "That an arrangement be approved between the company and its members whereby the capital of the company shall be increased and the rights of the members be modified to the extent and manner hereinafter mentioned."

(2.) "Accordingly that the directors be authorised to increase the capital of the company to 200,000*l.* by the creation of 440,000 additional cumulative participating preference shares of 5*s.* each ranking for dividend and in all other respects pari passu with the existing cumulative participating preference shares in the company."

(3.) "That notwithstanding the provisions of clause 42 of Table 'A' the directors may dispose of the said additional shares in such manner as they think most beneficial to the company."

(4.) "That after the sanction by the Court of the proposed arrangement the balance of profit referred to in sub-clause (*e*) of clause 5 of the memorandum of association shall be paid as to 25 per cent. thereof to the holders of the preference shares pro rata, as to 50 per cent. to the holders of the ordinary shares pro rata, and as to 25 per cent. to members of the board of directors."

(5.) "That after the sanction by the Court of the proposed

NEVILLE J. arrangement the rights conferred on members of the company by clause 5 of the memorandum of association may be modified or dealt with in the manner mentioned in clause 4 of Table 'A' in the First Schedule to the Companies (Consolidation) Act, 1908, but not otherwise."

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(6.) "That the company may assent to any modification of the above arrangement or to any conditions the Court may think fit to approve or impose."

The meetings ordered by the Court were held and the resolutions were carried in every case unanimously. The French company, as being entitled under their agreement to an allotment of 400,000 ordinary shares in the company, had also passed a resolution consenting to the alteration of the memorandum.

Henry Johnston, for the petition. This petition is presented for the approval of the Court to an arrangement between the company and some classes of its shareholders under s. 120 of the Companies (Consolidation) Act, 1908. The company proposes to vary its memorandum of association, but not in the two ways mentioned in s. 45, namely, by consolidating shares of different classes, or dividing shares into different classes; therefore s. 45 does not apply: *In re Palace Hotel, Ld.* (1); and we are able to proceed by special resolution under s. 120.

[NEVILLE J. That section gives no special power to alter the memorandum.]

There is no limit to what may be done under s. 120. The section is taken from s. 2 of the Joint Stock Companies Arrangement Act, 1870, which only applied to creditors, and there was no limit to what creditors could do under it; the Companies Act, 1900, made it apply to shareholders in a winding-up, and the Act of 1908 extended it to shareholders in a going company, and it was not limited in any way by either Act. It would appear that s. 45 is unnecessary as an enabling section, but it cannot limit the established powers under s. 120.

The scheme also provides for issuing the new shares without offering them to existing members of the company as provided by clause 42 of Table A, which we have adopted, and in the future

(1) [1912] 2 Ch. 438.

to alter the rights of the shareholders under the new memorandum by passing resolutions at separate meetings of each class as provided by clause 4 of Table A. The present arrangement merely makes the directors give up part of their share of surplus profits under clause 5 (*e*) to the preference shareholders. Both these parties have agreed, and the ordinary shareholders are not affected.

Cur. adv. vult.

Dec. 10. NEVILLE J. A company registered under the Companies Acts with a memorandum of association cannot, even with the consent of all its members, vary the memorandum except so far as it is authorized to do so by statute: see *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1); and this, in my opinion, applies just as much to the provisions relating to the capital of the company as to any other provisions in the memorandum. Sect. 41 of the Companies (Consolidation) Act, 1908, and the succeeding sections give power to a company to alter its capital, s. 41 giving extensive power to a company to alter the conditions of its memorandum "if so authorised by its articles." Such powers must be exercised by special resolution and are subject to the conditions laid down in the succeeding sections. Where the necessary authority is not contained in the articles a special resolution altering the articles is necessary before the company can take advantage of the powers contained in s. 41. Sect. 45 gives power to a company by special resolution confirmed by the Court to modify its memorandum so as to reorganize its share capital in two ways, either by consolidation of shares of different classes or by the division of its shares into shares of different classes. The section contains an important proviso protecting the existing interests of shareholders, namely, that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class confirmed in the same manner as a special resolution. The majority here required is an absolute majority

(1) (1875) L. R. 7 H. L. 653.

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of the class holding three-fourths of the share capital of that class, exceeding the requirements of a special resolution. I think that this section gives power inferentially to interfere with preferential rights where they are created by the memorandum.

I am unable, however, to read the section as a limiting and not an enabling section. I think it gives a right to modify the memorandum only in the cases coming within the section, and I cannot read it as providing that, whereas all other provisions of the memorandum with regard to capital may be modified under s. 120, in these two cases of consolidation of shares of different classes, or division of shares into different classes, the stringent regulations with regard to class meetings of s. 45 are to apply. Such an interpretation seems to me unreasonable. To construe the Act as giving alternative methods of interfering with the rights of preference shareholders where the preference is given by the memorandum appears to me more unreasonable still, having regard to the notable difference in the requirements under the two sections. Sect. 120 does not give any express authority to alter capital or interfere with the rights of preference shareholders. If the requirements of s. 41 or s. 45, as the case may be, are complied with, then there appears to me no difficulty in sanctioning an agreement which involves the exercise of all or any of the powers in both or either of those sections; but I cannot think that upon a fair construction of the statute it can be said that the meaning of s. 120, which is silent as to any alteration in the company's capital, was intended to overrule the provisions of these sections with regard to the matters expressly dealt with by them. It is suggested that s. 45 crept into the Act by mistake, but I see no ground for thinking so, inasmuch as the Act, as it stands, seems to me free from ambiguity or inconsistency unless one insists upon reading s. 120 as including matters with regard to which it is silent. Once do this, and then I agree s. 45 and s. 120 are inconsistent and puzzling, but the difficulty appears to me a gratuitous one.

I think, therefore, that in the present case the rights of preference shareholders, where those rights are determined by the memorandum, cannot be interfered with without fulfilling the conditions required by s. 45. It appears to me that my

present decision is probably inconsistent with the reported decision of Swinfen Eady J. in *In re Palace Hotel, Ld.* (1) I need not say that finding myself in difference with him I express my own opinion with diffidence; but, the construction above referred to having been already more than once applied by me to cases with which I have had to deal, I do not think I ought to follow that decision. As matters stand, I cannot sanction the agreement in the present case; but, if it is wished, I will allow the petition to stand over in order that what I conceive to be the statutory requirements may be fulfilled.

In my opinion, the duplication of the preference shares is an interference with the preference of the existing shareholders.

Solicitor: *George Dodds Perks.*

J. R. B.

In re WHITE.
THEOBALD *v.* WHITE.

[1912 W. 2110.]

Will—Construction—Legacy—Bequest of Shares or of Money to buy the Shares—Shares in Private Company—Dividend, whether apportionable—"Public Company"—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 5—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 121.

The term "private company" in s. 121 of the Companies (Consolidation) Act, 1908, is only a convenient way of describing, for the purposes of that Act, a particular class of companies subject to the Act; and a company incorporated under the Companies Acts either before or after that Act, and so constituted, either originally or by subsequent alteration of its articles, as to be a private company within the meaning of that expression in s. 121 of the Act, is nevertheless a "public company" for the purposes of the Apportionment Act, 1870.

A company, incorporated in 1899 under the Companies Acts, 1862 to 1898, passed special resolutions in 1907 altering its articles of association so as to be a private company as defined by s. 37 of the Companies Act, 1907, which enactment is repealed and reproduced by the Companies (Consolidation) Act, 1908, s. 121. G. and his son held ordinary shares in the company. One of the articles of the company provided that, on the death of G., his son should have the right to purchase so many ordinary shares of G. as would make up the son's holding to

(1) [1912] 2 Ch. 438.

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667 ordinary shares; and another article provided that H. should have the right to purchase so many of G.'s ordinary shares as the son should not purchase under the previous article.

G. died and by his will bequeathed so many of his ordinary shares in the company to his son as would make up the son's holding to 667 shares, but if any provision in the articles of the company might so operate as to prevent the said specific bequest taking effect then in lieu thereof he bequeathed to his son a legacy equal in amount to the purchase-money of so many of his (the testator's) ordinary shares as the son should be entitled to purchase under the aforesaid article. The company paid substantial dividends:—

Held, that the bequest to the son did not operate as a specific gift of shares but as a gift of money to buy the shares, and therefore that the Apportionment Act, 1870, did not apply to the accruing dividend on the shares.

ADJOURNED SUMMONS.

This was an application to determine the construction of a bequest in a testator's will, upon which depended the right of the residuary legatees to a proportion up to the testator's death of the accruing dividend on his ordinary shares in a private company called Howlett & White, Limited.

The company was incorporated in February, 1899, under the Companies Acts, 1862 to 1898, with memorandum and articles of association, and acquired as a going concern the partnership business of Howlett & White, in which G. White and his son G. E. White and one J. G. Howlett and others were the partners. The capital of the company was 90,000*l.* divided into 7000 preference shares of 10*l.* each and 2000 ordinary shares of 10*l.* each. G. White and his son were two of the directors and held a large number of the ordinary shares in the company.

In May, 1908, the company passed special resolutions altering its articles of association so as to be a "private company" within the definition of that term in s. 37 of the Companies Act, 1907. That Act was repealed by the Companies (Consolidation) Act, 1908, which in s. 121 reproduces s. 37 of the Act of 1907.

The material articles of the company were as follows:

Article 3 defined "the Howlett family" to mean J. G. Howlett and his sons A. G. Howlett and J. W. Howlett, and "the White family" to mean George White and his son George Ernest White.

Article 31. "On the death of the said George White the said George Ernest White shall have the right to purchase at a fair price so many of the ordinary shares to which the said George White is entitled at his death as shall make up the holding of the said George Ernest White to 667 ordinary shares." Then followed certain options for George Ernest White or his executors or administrators to purchase shares in certain events which had not happened.

Article 32. "Subject to the last preceding clause, on the death of the said George White, the surviving members or member of the Howlett family shall have the right to purchase at a fair price all such or so many of the ordinary shares to which the said George White is entitled at his death, as the said George Ernest White, or his executors or administrators (as the case may be), shall not elect to purchase under the last preceding clause hereof."

Article 33 gave an option in certain events to G. E. White to purchase the ordinary shares of the Howlett family.

Article 39 provided that, "subject to the foregoing provisions," any ordinary share might be transferred by a member holding ordinary shares to another member holding ordinary shares, or to a son or wife of the transferor, and any ordinary share of a deceased member might be transferred by his executors or administrators to a son or widow of such deceased member, and the executors or the trustees of the will of a deceased holder of ordinary shares might hold such shares or any of them in trust for the widow of the deceased, or for his son.

Article 44 prescribed the method for ascertaining the fair value of an ordinary share.

Article 46 empowered the directors to refuse to register the transfer of a share where (inter alia) the directors in their absolute discretion did not approve of the proposed transferor, or where such transfer was in contravention of any of the clauses 31 to 37 (inclusive).

The company was very prosperous and at its annual general meeting in February of each year declared and paid one annual dividend for the year ending the previous December 31. The last dividend paid was in February, 1912.

NEVILLE J. 1912 WHITE, *In re.* THEOBALD *v.* WHITE.

George White, by his will dated February 28, 1912, appointed his son, the defendant G. E. White, and the two plaintiffs the executors and trustees thereof. The will contained the following disposition :—

Clause 3. "Whereas under or by virtue of clause 31 of the articles of association of Howlett & White Limited my said son will have the right on my death to purchase at a fair price so many of the ordinary shares in the said company to which I shall be entitled at my death as shall make up the holding of my said son to 667 ordinary shares Now I hereby bequeath to my said son free of death duties so many of my ordinary shares in the said company as shall make up the holding of my said son in the said company at my death to 667 ordinary shares Provided always that if by reason of the before mentioned clause or any other clause or provision in the said articles of association there should be anything which might so operate as to prevent the foregoing specific bequest being effective then and in such case but only in such case in lieu of such specific bequest I bequeath to my said son free of death duties a legacy equal in amount to the purchase money of so many of my ordinary shares in the said company as he shall be entitled to purchase at my death under the aforesaid provision."

And the testator after bequeathing certain specific and general legacies devised and bequeathed all his residuary real and personal estate upon trust for sale and conversion and directed his trustees to hold the net residue thereof upon trusts for his daughters and their issue as therein mentioned.

The testator died on May 11, 1912, and his will, with an immaterial codicil, was duly proved by all the executors.

The testator at his death held 550 ordinary shares and his son G. E. White held 383 ordinary shares in the said company, and on June 28, 1912, the executors, in order to give effect to the said bequest in clause 3 of the will and increase the son's holding to 667 ordinary shares, executed a transfer in his favour of 284 of the testator's ordinary shares in the company. The transfer was in common form and for a nominal consideration, and the directors of the company passed it without objection.

The executors, being advised that the company at its next

general meeting in February, 1913, would declare a substantial dividend for the year ending December 31, 1912, issued this summons to determine (1.) whether, having regard to the provisions in clauses 31, 32, 39 and 46 of the articles of association of Howlett & White, Limited, the bequest contained in clause 3 of the testator's will in favour of the defendant G. E. White took effect (*a*) as a bequest of so many of the testator's ordinary shares in the company as would make up the holding of the defendant G. E. White at the testator's death to 667 ordinary shares, or (*b*) as a legacy equal in amount to the purchase-money of so many of the testator's ordinary shares in the company as the defendant G. E. White was entitled to purchase under clause 31 of the said articles of association; and (2.), if the said bequest took effect as a bequest of shares, whether the dividends accruing on the said shares since the last declaration of dividend thereon ought to be apportioned between the testator's estate and the defendant G. E. White.

The defendant Ellen Theobald (married woman) was one of the residuary legatees under the said testator's will.

Simpkin, for the plaintiffs.

J. G. Wood, for the defendant G. E. White. If the legacy takes effect as a gift of specific shares, it is a question whether the Apportionment Act applies. But if it is a gift of money to buy the shares, the son would acquire them "cum div." as an ordinary purchaser, and the Apportionment Act would not apply. It is submitted, in the first place, that the Apportionment Act does not apply at all. In order to apply, the company must be a "trading or other public company" within the meaning of s. 5 of the Act. It is settled that a company incorporated under a public statute and whose shares are transferable to the public is a public company: *Macintyre* v. *Connell* (1); *In re Lysaght* (2); *In re Sharp* (3); and in *In re Lysaght* (4) Lindley M.R. added that "any company registered under the Companies Act, 1862, is a public company within the meaning of that expression in the Apportionment Act," but that dictum was before the Companies Act, 1907. By

(1) (1854) 1 Sim. (N.S.) 225.
(2) [1898] 1 Ch. 115.
(3) (1890) 45 Ch. D. 286.
(4) [1898] 1 Ch. 122.

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that Act the Legislature for the first time approved of private companies and defined (s. 37) a private company to be a company which (amongst other things) limits the number of its members and whose shares are not transferable to the public. The Act of 1907 is repealed by the Companies (Consolidation) Act, 1908, but s. 37 is reproduced in s. 121 of the Act of 1908. The Legislature intended by those provisions to draw a distinction between public companies and private companies, and a company which is a private company under the Companies Acts, 1907 or 1908, ceases to be a public company. Here the company was formed under the Act of 1862, but by special resolutions became a private company with shares not transferable to the public, and therefore is no longer a public company within the meaning of the Apportionment Act. That Act does not apply to a trading partnership, nor to a limited partnership under the Limited Partnerships Act, 1907; and it is submitted that private companies, which are a form of limited partnership and have largely taken the place of limited partnerships, are on the same footing. Secondly, if that contention is wrong, there is enough in the will to exclude the Apportionment Act: *Tyrrell* v. *Clark*. (1) The bequest on its true construction, having regard to the articles of the company, is not a gift of the shares but of money to buy the shares. The testator had no power to bequeath the shares because under articles 31 and 32 the Howlett family had a right to buy them if the son did not. The transfer of the shares to the son for a nominal consideration is not material. It would be a mere formality for the executors to hand the son the purchase price and for him to hand it back to them. The testator wished his son to have the shares free of duty and with all benefits and without paying any money for them. But he had a doubt about it, and, as an alternative gift, he gives the son the money to buy them which takes effect. Therefore the Apportionment Act is excluded because under the alternative gift the son buys the shares "cum div."

Fischer Williams, for the residuary legatee. This is a specific gift of shares and, if the Apportionment Act applies, the dividends are apportionable. The company is still a public

(1) (1854) 2 Drew. 86.

company within the meaning of the Apportionment Act, although for the purposes of the Companies (Consolidation) Act, 1908, it is a private company. You must consider the state of the law when the Apportionment Act, 1870, was passed—*Macintyre* v. *Connell* (1)—and not the subsequent Companies Acts. This was a public company in 1899 within the terms of the Apportionment Act, and could not change its status by merely passing resolutions under the Act of 1907. Sect. 37 of that Act as reproduced by s. 121 of the Act of 1908 says "for the purposes of this Act" certain companies as there defined are private companies, and various sections in the Act confer on them certain powers, restrictions, and privileges which other companies have not got, but it is submitted that for all other purposes they remain public companies. Further, these dividends are "periodical payments" within the meaning of the Apportionment Act: *Jones* v. *Ogle* (2); *In re Cox's Trusts* (3); *In re Griffith.* (4) Lastly, article 39 applies to a transfer of these shares as well as to any other shares. The testator held them and could dispose of them subject to an equitable right in the Howlett family which they have not exercised. The son having taken the gift of the shares, as shares, which have been transferred to him for a nominal consideration, and the transfer having been passed by the directors, cannot now turn round and say that the articles have so operated as to prevent him from taking the gift of shares and claim that it is a money legacy. But if the legacy is a gift of money, probably the argument under the Apportionment Act fails.

NEVILLE J. The points in this case arise in rather a curious way. If the Apportionment Act, 1870, does not apply, it is immaterial whether the bequest to the testator's son is a gift of shares or of money to buy shares. But if the Apportionment Act applies, then it is important to consider the form in which the gift is made. Having regard to the conclusion to which I have come on the construction of the bequest, it is not necessary to decide whether the Apportionment Act applies, but as the point has been fully argued I will express my opinion upon

(1) 1 Sim. (N.S.) 225, 233.
(2) (1872) L. R. 8 Ch. 192.
(3) (1878) 9 Ch. D. 159.
(4) (1879) 12 Ch. D. 655.

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it. The question gives rise to a certain amount of difficulty. It has long been settled that companies incorporated under the Companies Act, 1862, are public companies within the meaning of that term in the Apportionment Act, 1870. Then the Legislature by s. 121 of the Companies (Consolidation) Act, 1908, has for the purposes of that Act defined certain companies as private companies with certain distinctions between them and other companies under the Act. But it seems to me that the use of the words "private company" is not conclusive, because I think that phrase is only a convenient way of referring to a particular class of public companies for the purposes of the Act. Lindley M.R. in the case of *In re Lysaght* says (1): "I desire to add one word as to what is a public company. I thought that the meaning of a public company was settled so long ago as *Macintyre* v. *Connell* (2), and I take it that any company registered under the Companies Act, 1862, is a public company within the meaning of that expression in the Apportionment Act." With that proposition I respectfully agree, but of course it does not decide whether a private company under the Act of 1908 is a public company. I am of opinion, however, that there is really no such distinction between private companies and other companies under the Act of 1908 as enables me to say, with regard to the provisions of the Apportionment Act, 1870, that a particular class of companies are private companies and other companies are public companies. I think therefore that the Apportionment Act does apply to private companies under the Act of 1908.

In the next place, what did the testator bequeath? Under article 31 of the articles of association of the company the son had the right to purchase at a fair price so many of the testator's ordinary shares in the company as would make up his own holding to 667 shares, and under article 32 the Howlett family had the right to purchase all the testator's ordinary shares except such as were acquired by the son in the exercise of his option under article 31. With those facts before me I apply myself to the construction of the gift in the will. The testator recites article 31 and then goes on to say: [His Lordship read the bequest,

(1) [1898] 1 Ch. 115, 122. (2) 1 Sim. (N.S.) 225.

and continued:] Now what is the proper interpretation of the words "provided that if by reason of the before mentioned clause or any other clause or provision in the said articles of association there should be anything which might so operate as to prevent the foregoing specific bequest being effective then and in such case in lieu of such specific bequest" he bequeathed to his son a sum of money. Was there anything in the articles that might so operate as to prevent the specific bequest to the son? Most obviously there was something which might so operate, because, if the son did not exercise his option to purchase under article 31, the alternative right of the Howlett family arose under article 32, and they could come in and claim to purchase any of the shares bequeathed: that might have happened. I think therefore that the proviso operates, and consequently that the bequest is not a specific bequest of the shares but a gift of a sum of money to buy the shares, and therefore that the Apportionment Act, 1870, does not apply to the accruing dividend.

Solicitors for all parties: *Tarry, Sherlock & King, for E. E. Blyth, Norwich.*

H. L. F.

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In re STEAD.

SMITH *v.* STEAD.

[1910 S. 3047.]

Solicitor and Client—Conveyancing Costs—Taxation—Abortive Sale—No subsequent Sale—Scale Fees—Item Charges—Amendment of Bill delivered—General Order under Solicitors Remuneration Act, 1881, *s.* 2, *sub-ss.* (*a*) *and* (*c*); *Sched. I., Part I., r.* 2; *Sched. II.*

There is no inconsistency between the provisions in Part I. of Sched. I. to s. 2 (*a*) and those in s. 2 (*c*) and Sched. II. of the General Order to the Solicitors Remuneration Act, 1881, with respect to conveyancing business. Sect. 2 (*a*) and Sched. I., Part I., prescribe the scale of charges for a completed sale and also for an ineffectual sale which is afterwards followed by a completed sale. Sect. 2 (*c*) and Sched. II. prescribe the scale of charges where there has been an abortive sale not followed by a subsequent sale.

Where on taxation of a solicitor's bill of costs he finds that he has made an error in the bill delivered and has charged for certain items on the wrong scale, he may be allowed to lodge an amended bill of item charges in the particular matter, provided that the aggregate of the item charges in the amended bill when taxed are, if necessary, reduced to the aggregate amount of the items improperly charged in the bill first delivered.

Adjourned Summons.

This was an application by a solicitor to review the taxation of certain conveyancing costs under these circumstances.

The above-named Alice Stead died in 1897. By her will she appointed four trustees and executors, namely, R. W. Stead (a solicitor), one Louis Ellis, the plaintiff Norman Smith, and the defendant A. J. Stead (a solicitor), and all four executors duly proved the will, which contained a wide power for any executor or trustee thereof, being a solicitor, to act as solicitor to the estate and to charge for his professional services.

Louis Ellis retired from the trusteeship in 1901, and R. W. Stead died in May, 1907. No new trustees of the will were appointed, and since the death of R. W. Stead the only trustees were the plaintiff Norman Smith and the defendant A. J. Stead. R. W. Stead and the defendant A. J. Stead never were in partnership as solicitors, but R. W. Stead during his life acted as solicitor to

the estate, and after his death the defendant A. J. Stead acted in that capacity.

In September, 1910, the present action was commenced by originating summons for the administration of the testatrix's estate, and by an order made on October 13, 1911, it was (amongst other things) ordered that the bills delivered by the defendant A. J. Stead as solicitor-trustee in respect of fees, charges, and disbursements subsequent to the death of R. W. Stead be referred to the taxing Master for taxation.

The bills were in due course taxed, and the only dispute arising out of the taxation was as to five items of conveyancing costs contained in one of the bills. These conveyancing costs were incurred in connection with an attempted sale by auction of four lots of property situate in Manchester and Salford and which formed part of the estate of the testatrix. None of the lots were sold and none had since been sold.

The conveyancing costs charged in the bill were as follows :—

"Item.	Date.		£	*s.*	*d.*
1240	1909 May and June	To charges for conducting attempted sale by auction for properties in (giving details) Salford, including preparation of particulars advertisements posters circulars attendances on printers newspaper proprietors bill posters sale room proprietors auctioneers and persons making enquiries, when all the properties were withdrawn on reserves amounting to 4750*l.* (as per scale) . .	12	5	0
1241		Perusing abstract of title and preparing special conditions of sale—			
		Lot 1	4	4	0
1242		Lot 2	4	4	0
1243		Lot 3	3	3	0
1244		Lot 4	3	3	0"

The taxing Master, being of opinion that Part I. of Sched. I. to the General Order of the Solicitors Remuneration Act, 1881,

NEVILLE J. applied, allowed item 1240, which was the proper charge according to the scale fee, but disallowed items 1241—1244 (inclusive), being of opinion that they were covered by the scale fee.

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The defendant A. J. Stead carried in the following objections to the taxation :—

"The said A. J. Stead objects to the allowance of item No. 1240 and to the disallowance of items Nos. 1241, 1242, 1243, and 1244 in the bill of costs for the following reasons :—

"The said items are charges for work done in connection with an attempted sale by auction of four lots of property held under different titles. Prior to the auction a reserve price was fixed for each lot. At the auction all the lots were withdrawn, there being no bids for any of the lots which equalled or even approached the reserve prices. Shortly after the auction there were in the case of some of the lots negotiations, but no satisfactory offer was obtained, and all the properties are still unsold. Owing to the depressed state of the property market no further auction sale is at the present time contemplated.

"The said A. J. Stead in framing the said bill of costs followed a practice which is somewhat prevalent in Manchester, viz. he charged for conducting the attempted sale the fee prescribed by Part I. of Schedule I. to the General Order in pursuance of the Solicitors Remuneration Act, 1881, for conducting an auction sale where the property is not sold and an additional fee for perusing the title and preparing the particulars and conditions of sale of each lot. He paid the auctioneer's fee (for advising as to the lotting and as to the reserve prices and for taking the bids) out of his own pocket.

"But the fees prescribed by Part I. of Schedule I. only apply to completed business (General Order, s. 2, sub-s. (*a*)). The remuneration in connection with transactions which are not completed is to be according to the old system as altered by Schedule II. to the said Order (General Order, s. 2, sub-s. (*c*) ; *In re Dean* (1) ; *In re Smith, Pinsent & Co.* (2) ; *In re Reade* (3)). It is true that Part I. of Schedule I. specifies a fee for conducting a sale by auction 'when the property is not sold.' But as Part I.

(1) (1886) 32 Ch. D. 209. (2) (1890) 44 Ch. D. 303.
(3) [1889] W. N. 26 ; 33 Sol. J. 219.

Schedule I. applies only in the case of sales completed this particular item can only be charged for an abortive auction which is followed by a completed sale.

"The said A. J. Stead admits that the practice he followed in framing his bill is not in accordance with the said General Order and that he ought to have charged item charges under the old system as altered by Schedule II. to the said General Order. A bill of such item charges is left herewith and he submits to have it taxed according to the said schedule. He further submits to have the aggregate of the said item charges reduced to the aggregate of the said items Nos. 1240, 1241, 1242, 1243, and 1244 in his original bill of costs."

The taxing Master adhered to his opinion and overruled the objections. The defendant A. J. Stead took out a summons asking that his objections might be allowed and that it might be referred back to the taxing Master to vary his certificate accordingly.

The defendant residuary legatees did not appear on the hearing of the summons.

Jenkins, K.C., and *Linton Thorp*, for the summons. The question is (1.) whether the solicitor is to be paid by the scale in Part I. of Sched. I. or by the scale in Sched. II.; and (2.) whether, having made an error in his bill, he is entitled to be allowed a sum not in excess of the amount of the items charged in error in the first bill. The solicitor framed these conveyancing charges following a practice at Manchester which seems somewhat irregular and cannot be supported.

[NEVILLE J. It is to be hoped that the practice will not be continued in the future.]

Sect. 2 (*a*) of the Order provides a scale of charges in Part I. of Sched. I. for completed business, and s. 2 (*c*) and Sched. II. prescribe item charges for business not completed. But on turning to Part I. of Sched. I. there is an express scale fee when the property is not sold, and there is an apparent inconsistency between that provision and Sched. II. There is no direct authority, but it is submitted that the principle of *In re Dean* (1) and *In re Smith, Pinsent & Co.* (2) applies, and

(1) 32 Ch. D. 209. (2) 44 Ch. D. 303.

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that Part I. of Sched. I. deals with an effectual sale that is afterwards followed by a completed sale, and that Sched. II. applies where there is an abortive sale and no subsequent sale. Here there was an attempted ineffectual sale and no subsequent sale, and the item charges in Sched. II. apply and not the scale fee in Part I. of Sched. I. If afterwards there was a sale the solicitor would bring into account the item charges he has received. Here the five items in the first bill amount to 26*l.* 19*s.* and the bill of item charges brought in amounts to 38*l.* 8*s.* It is admitted that under the item bill the solicitor cannot get more than 26*l.* 19*s.*, but subject to that he claims to have the item bill taxed under Sched. II. Secondly, on the hearing of the objections before the Master no objection was taken on the ground of the item bill having been lodged. If objection had been taken the solicitor could have applied to the Court for leave to amend his bill. I rely on the judgment of Lord Halsbury in *Parker* v. *Blenkhorn* (1), which on this point is reported only in the *Law Times*, where he says (p. 907) that an error in a solicitor's bill can be remedied.

Peterson, K.C., and *St. John Clerke*, for the plaintiff. The solicitor cannot amend now. He is bound by his bill delivered and cannot alter it or increase the amount of it. He ought to have made a special application to the Court when the matter was before the Master: *In re Walters* (2); *In re Whalley*. (3)

[NEVILLE J. No objection was taken before the Master. I can give leave now to amend the bill, if necessary. As the matter is now before me I had better deal with it on the merits. It will save expense.]

Then as to the General Order, and the rules and schedules. No one can doubt that the authors of them intended to deal with an abortive sale in Part I. of Sched. I., and r. 2 in Part I. of that schedule supports this view. It is submitted that the taxing Master was right. In the cases cited the particular point now taken was not before the Court. *In re Dean* (4) was not a decision between scale fees and item charges,

(1) (1888) 11 App. Cas. 1; 59 L. T. 906, 907.
(2) (1845) 9 Beav. 299, 302.
(3) (1855) 20 Beav. 576.
(4) 32 Ch. D. 209.

but whether the solicitor was to get item charges or nothing at all. The observations of North J. in *Cholditch* v. *Jones* (1) are in my favour.

NEVILLE J. It appears to me that the matter I have before me was really decided in principle by Kay J. in the case of *In re Dean* (2), and the same view was, broadly speaking, taken by Chitty J. in the case of *In re Smith, Pinsent & Co.* (3) Apart from those authorities, I should have come to the same conclusion on the General Order, rules, and schedules to which my attention has been directed. In my opinion the construction of the General Order, s. 2 (*a*), is free from doubt. It says, "In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in Part I. of Schedule I. to this Order, and to be subject to the regulations therein contained." Then sub-clause (*c*) of that section, which seems to me equally clear, says, "In respect of business not hereinbefore provided for," (I need not trouble about that) "connected with any transaction the remuneration for which, if completed, is hereinbefore, or in Schedule I. hereto, prescribed, but which is not, in fact, completed, and in respect of . . . . all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto prescribed," but which is not, in fact, completed "the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." Broadly speaking, that means the fees for completed business are to be regulated by Sched. I., and the fees for uncompleted business are to be item charges. So far there is no difficulty or doubt about the matter. But when we turn to Sched. I., Part I., we find a provision for the payment of a scale fee "when the property is not sold," and that is a fee on the reserved price and is a reduction of the amount of the scale fee payable on a sale. At first sight it looks as if Sched. I. was intended to deal with completed and uncompleted business notwithstanding s. 2, sub-ss. (*a*) and (*c*). I think the explanation of it is this. In

(1) [1896] 1 Ch. 42. (2) 32 Ch. D. 209.
(3) 44 Ch. D. 303.

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many cases of completed sales when you come to ascertain the remuneration in taxing the solicitor's costs you find the property was not sold in the first instance, but has been sold afterwards, perhaps after several abortive attempts to sell by auction, or perhaps after an abortive attempt to sell by auction it has been sold by private treaty. If you take Sched. I. with r. 2 attached to it, you find that is what the schedule is dealing with. It is dealing, I think, with the cases of sales which in fact have been completed, but not completed in the first instance. I quite agree there are certain words in r. 2 that do not seem to apply very directly to that position. I do not think, however, that there is any such ambiguity as to justify me in neglecting to give due weight to the express words of the Order, and I think the matter is left to a very short point free from confusion or doubt if you realize that Sched. I. is, as the Order says it is to be, directed solely to a completed sale.

I will not add anything to what I have said on the question whether the solicitor is entitled to bring in an item bill not exceeding the amount charged in his first account, except to say that I think that could be obtained by an application for leave to amend his bill. I deal with the matter now on the amended bill brought in by the solicitor, and I think he is entitled to his item charges under Sched. II. not exceeding the aggregate of the charges that have been made. The matter therefore will go back to the taxing Master to tax the item bill under s. 2 (*c*), the solicitor submitting to have the aggregate of the item bill when taxed reduced to the aggregate of the items 1240 to 1244, both inclusive, and the costs will be costs in the taxation.

Solicitors: *C. P. Fielder, Le Riche & Co., for A. J. Stead, Manchester; F. M. Jeboult.*

H. L. F.

WARRINGTON J.
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Dec. 17, 18.

In re FINLAY.
C. S. WILSON & CO. *v.* FINLAY.

[1911 F. 1415.]

Principal and Agent—Stockbroker—Speculative Transactions—Open Account—Death of Client before Settling Day—Duty of Broker—Reduction of Amount of Client's Indemnity—Closing Account—Taking over of Client's Shares by Broker at a Valuation—Liability to account.

Where there is an open account between a broker and his client, and the client dies before the next settling day, the broker is entitled to close the account at once and to sell all shares in respect of which he has entered into contracts on behalf of the client. For this purpose it is not necessary that there should be an actual sale of the shares. The broker may, if he pleases, take over the shares himself at a valuation based on the market prices of the day, provided that by so doing the estate of the client is not prejudiced.

Walter & Gould v. *King* (1897) 13 Times L. R. 270; *Macoun* v. *Erskine, Oxenford & Co.* [1901] 2 K. B. 493; and *Erskine, Oxenford & Co.* v. *Sachs* [1901] 2 K. B. 504, followed.

Ellis v. *Pond* [1898] 1 Q. B. 426, distinguished.

Adjourned Summons.

Maurice Trent Finlay, by his will, dated October 8, 1892, appointed his widow, the defendant, Clarissa Rose Finlay, sole executrix thereof.

The testator died by his own hand some time between the evening of October 24 and the morning of October 25, 1911, and his will was duly proved by the defendant on November 8, 1911.

At the time of his death the testator was engaged in extensive speculative transactions in rubber and other shares, and had a large number of accounts open with the plaintiffs, C. S. Wilson & Co., who were brokers of Mincing Lane but not members of the Stock Exchange, and with other brokers. The plaintiffs had made large purchases of shares on the instructions and for the account of the testator. The great bulk of the shares so purchased by the plaintiffs had been carried over for the testator from settling day to settling day. A small number had been taken up by and in the name of the plaintiffs as, there being no "takers," they were unable to carry them over. They were the registered holders and held the certificates of these shares.

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On October 20, 1911, the testator called upon the plaintiffs and stated that his affairs were in a very involved state and requested them to realize all the shares which they were carrying over as well as those for which they held certificates as speedily as possible.

The testator, as before stated, died on or before the morning of October 25, 1911, and on the same day the plaintiffs had the shares then remaining unsold valued by a member of the Stock Exchange and closed the testator's account by themselves taking over the shares at that valuation. They accordingly credited the testator's account with the amount of the valuation less the ordinary brokerage as on a sale, and claimed to be paid the balance thus shewn to be due to them.

On October 31, 1911, the plaintiffs, on behalf of themselves and all other creditors of the testator, commenced the present action against the defendant for the administration of his estate, and on November 28, 1911, the usual creditors' administration judgment was pronounced.

In the action the plaintiffs carried in a claim for 1522*l.* 4*s.*, but the Master disallowed the sum of 74*l.* 11*s.* 3*d.* claimed by them for commission, thereby reducing the claim to 1447*l.* 12*s.* 9*d.*

On July 31, 1912, the Master made his certificate by which he certified (inter alia) that there was due to the plaintiffs the sum of 1447*l.* 12*s.* 9*d.*

This was a summons taken out by the defendant asking that the certificate of the Master might be discharged or varied by disallowing the debt of 1447*l.* 12*s.* 9*d.* thereby certified to be due to the plaintiffs.

W. S. Schwabe and *G. T. Simonds*, for the defendant. The plaintiffs' claim ought to have been disallowed. A broker employed to act on behalf of a principal cannot sell to himself shares of his principal, or which he has a right to sell on his principal's behalf: *Rothschild* v. *Brookman.*(1) He is entitled to be indemnified by his principal against any liability in respect of shares purchased on his behalf when such liability arises from a default made by the principal, but not where it arises from his

(1) (1831) 5 Bli. (N.S.) 165.

own default: *Ellis* v. *Pond.* (1) In the present case even if the brokers had a right to close the account they were not entitled to close it in the way in which they assumed to do so. Subject to their properly closing the account they were bound to deliver the shares on the next settling day, which was October 27, but by purchasing the shares themselves and dealing with them as their own they put it out of their power to perform their contract. The same result follows if the authority to sell is not regarded as having been determined by the death of the testator.

None of the cases go so far as to decide that brokers are entitled upon the death of their principal to close his account by taking over at a valuation shares which they have contracted to deliver at the next settling day. In *Walter & Gould* v. *King* (2) the brokers had before the account was closed taken up and paid for the shares themselves. In *Macoun* v. *Erskine, Oxenford & Co.* (3) it was held that the brokers were upon their client making default entitled to get rid of their personal liability by going into the market and selling the shares to a jobber, and that the closing of the account was not rendered invalid by reason of their having repurchased them from the same jobber. *Erskine, Oxenford & Co.* v. *Sachs* (4) followed the former decision. Those cases decide (1.) that where a broker is left by his client to face his liability to the jobber on the purchase he is entitled to get rid of that liability by selling the shares to another person, and (2.) that where there is no market for the shares a broker who has already paid for them and taken them up is entitled to go into the market and get a jobber to fix a price. There is no authority that where a broker has bought shares for a client and the client has died before the time for delivering the shares the broker can put an end to his contract with his client by taking over the shares himself at a valuation. So to hold would be to impose upon the executors of the client the onus of ascertaining whether the price at which the shares were taken over was a fair one.

In the present case the evidence does not shew that the brokers gave a fair price for the shares. Even if they are still

(1) [1898] 1 Q. B. 426.
(2) 13 Times L. R. 270.
(3) [1901] 2 K. B. 493.
(4) [1901] 2 K. B. 504.

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entitled to rely on their indemnity they ought to account for the difference between the price with which they credited the testator and the price at which they might have bought in the market and for any profits they may have made on the resale of the shares.

With regard to the shares held by the brokers as cover the applicant is entitled to a similar inquiry as to profits. There is no authority for saying that the brokers were entitled to take over these shares.

H. Terrell, K.C., and *W. Copping*, for the plaintiffs. The claim was rightly allowed. Stockbrokers who have purchased stock for a principal with their own money are, in the event of his death, justified in immediately selling the stock. Under such circumstances the stockbrokers have a claim against the estate of the principal for the balance due to them on the account: *Scrimgeour's Claim.* (1)

[They were stopped.]

WARRINGTON J. This is a summons to discharge or vary the Master's certificate, dated July 31, 1912, by disallowing a debt of 1447*l.* 12*s.* 9*d.* thereby certified to be due to the plaintiffs, C. S. Wilson & Co.

The facts are these. The testator in 1911 was engaged in considerable speculative transactions with the plaintiffs, who were brokers in Mincing Lane, but not members of the Stock Exchange. Those transactions resulted eventually in an account for the settling day of October 27, 1911. It appears that for that settling day there were a large number of shares for the purchase of which contracts had been entered into on the testator's behalf, which were carried over by the brokers. The brokers also held certain shares which belonged to the testator as cover or security. There is some doubt in the case with regard to one block of shares whether they were held in the ordinary sense as cover—that is, held by the brokers as mortgagees—or whether they came under the same category as those which were carried over and for which the principal was liable to pay the broker. But as will presently be seen, I do not think it makes much difference

(1) (1873) L. R. 8 Ch. 921, 925.

for the present purpose. The account for October 27, 1911, which has now been prepared and settled shews a balance of 1447*l.* 12*s.* 9*d.* which the Master has found to be due to the brokers, with this one exception, that in the circumstances which I shall mention directly the brokers had charged the testator with commissions on closing the account which the Master has disallowed. There was then an open account between the brokers and their client during the second half of October, 1911. On October 20 the testator gave the brokers instructions to sell the shares, including any shares which they held as security. Now, that to my mind was equivalent to a direction to the brokers to close the account. Some time between the evening of October 24 and the morning of October 25 the client died. It thereupon became the right and the duty of the brokers, either in accordance with the directions given by the client on October 20 or by reason of his death, to close the account. If the plaintiffs had been members of the Stock Exchange the death would have closed the account by the custom of the Stock Exchange, of which judicial notice is taken. Prior to October 25 the brokers had sold a considerable proportion of the shares upon the market, and they had duly credited their client with the proceeds of sale of such shares. After October 25 it became the brokers' duty not only to close the account, but to minimize the loss to their client in respect of his indemnity to them to the utmost possible extent. In pursuance of that duty, instead of going on the market with a large parcel of shares for sale at a time when, owing to the death of the testator, which caused a certain amount of sensation, there would have been a considerable risk of a slump in the shares, they did that which, as upon the evidence I think is clear, was for the benefit of themselves and their client—they took the shares over themselves. I do not say that they purchased them, for that does not seem to be a correct way of describing the transaction. All that happened was that certain contracts had been entered into by the brokers on behalf of the testator in respect of which he was bound to indemnify them, and it was their duty to reduce his liability on his indemnity as far as they could. They took the course of crediting him with what they conceived

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to be the value of the shares on the particular day on which the credit was given. On the evidence, I am of opinion that they credited him with the full value at that time of the shares. In doing that, I think, they did him no wrong, and, in my opinion, that view is supported by the authority of the three cases, *Walter & Gould* v. *King* (1), *Macoun* v. *Erskine, Oxenford & Co.* (2), and *Erskine, Oxenford & Co.* v. *Sachs* (3), to which reference has been made. Those cases establish to my mind that where, as in the present case, it is the duty of the brokers to close an account they may ascertain the value of the shares in respect of which the client is liable to indemnify them in such a way as they think best, provided that they do no harm to their client. No doubt, as was pointed out in *Macoun* v. *Erskine, Oxenford & Co.* (2), if they ascertain that value by going through the form of selling the shares and re-purchasing them on their own account they run the risk of having to establish thereafter that the value so ascertained was the real value of the shares. In my opinion, in the present case the brokers have shewn that the value which they ascertained by the mode they pursued was the real value of the shares. If so, they have done all that was incumbent on them to do, and in closing the account they have credited the client with the proper amount by way of reduction of his liability to indemnify them in respect of the contracts into which they had entered on his behalf. It seems to me that I should be going contrary to the decisions to which I have been referred if I were to take any other view of the legal relation between brokers and their clients. It seems to me that, so far as regards the shares that were carried over, the Master was right in holding that the brokers had credited their client with their full value, and that he was bound to allow their claim to indemnity at the amount shewn by the account to be due to them.

Then there arises a question of a different nature with regard to the shares which were held by the brokers as security, and on that question there is some doubt on the evidence with regard to certain shares, which it was said the brokers had actually taken

(1) 13 Times L. R. 270. (2) [1901] 2 K. B. 493.
(3) [1901] 2 K. B. 504.

up themselves, but I will treat them as if they had been actually held as security. The brokers dealt with those shares in the same way as they dealt with the shares in respect of which contracts had been entered into. Did they do wrong to the testator's estate by so doing? I quite agree that a mortgagee who has a power of sale cannot, of course, properly sell to himself. The mortgagor may, if he does that, seek to have the sale treated as if it had not taken place, and redeem the shares. But in this particular mode of proceeding I have only to find out whether the brokers have charged their client too much. The question seems to me to be exactly the same as that with which I have hitherto dealt—have the brokers in fact given to their client the full value of these shares which they held? The evidence is that they have, and I believe that in doing what they did they acted quite bona fide and in the best interests of themselves and their client, and that it would be wrong in such proceedings as these to hold that the balance shewn by the brokers on their account was not the true balance due to them.

I wish to say a word about one other case, *Ellis* v. *Pond* (1), which has been cited by counsel for the applicant. It has nothing to do with the present case, as it decides that where brokers commit a breach of their contract between themselves and their client they cannot, having committed that breach, insist upon the indemnity to which they are entitled under the contract. But in the present case the brokers have committed no breach of their contract. They were directed by their client to sell; the account was closed, and, that being so, they were entitled and bound by the contract to minimize the loss to their client as far as possible.

It seems to me, therefore, that the brokers committed no wrongful act, and, that being so, they are entitled to the indemnity given to them by the original contract. I must refuse the summons with costs.

Solicitors: *St. Barbe Sladen & Wing; Woodhouse & Davidson.*

(1) [1898] 1 Q. B. 426.

W. I. C.

C. A.
1912
Dec. 20.

HUGHES *v.* OXENHAM.

[1912 H. 938.]

Mortgagor and Mortgagee—Mortgage of Personalty—Foreclosure Summons—Action founded on "breach of contract"—Service out of the Jurisdiction—Practice—Rules of the Supreme Court, Order XI., *rr.* 1 (*e*), 8A.

A foreclosure action, whether by writ or originating summons, in respect of a mortgage of personalty, by the original mortgagee against the original mortgagor, is not an action founded on a breach of contract within the meaning of Order XI., r. 1 (*e*), and leave will not therefore be granted to serve the writ or summons upon the defendant out of the jurisdiction.

Decision of Neville J., ante, p. 181, reversed.

Deutsche National Bank v. *Paul* [1898] 1 Ch. 283, and *Kolchmann* v. *Meurice* [1903] 1 K. B. 534, followed.

Appeal from a decision of Neville J. (1)

By deed dated December 5, 1904, the defendants as beneficial owners conveyed by way of mortgage their respective interests in personalty under an English marriage settlement to the plaintiff to secure 270*l.* and interest. The deed contained (inter alia) the usual covenants by the defendants to pay principal and interest. All the parties to the mortgage deed were at its date resident in England, but the defendants were now resident in Australia.

On February 12, 1912, the plaintiff issued an originating summons against the defendants, claiming an account of what was due under the mortgage, and to enforce what should be found due by foreclosure or sale, and, on April 1, obtained an order giving him leave to serve the summons out of the jurisdiction upon the defendants in Australia. After the defendants had been served in Australia, one of them entered a conditional appearance and moved before Neville J. to discharge the order of April 1. Neville J. dismissed the application.

The defendant appealed.

Tomlin, for the appellant. An originating summons for foreclosure is not an action founded on a breach of any contract

(1) Ante, p. 181.

within Order xi., r. 1 (*e*). It is a pure action to enforce the security as distinct from an action on the covenant to pay the mortgage debt. The mortgage in this case is purely one of personal estate. A mortgagee has two remedies. He can sue the mortgagor upon his covenant, or he can take proceedings to enforce his security. The second remedy cannot be regarded as an action founded on a breach of any contract: *Deutsche National Bank* v. *Paul* (1); *Kolchmann* v. *Meurice*. (2) Neville J. distinguished those authorities on the ground that, in the first of them, there was no privity of contract between the plaintiffs, the mortgagees, and the defendants, who were assignees of the equity of redemption, and that *Kolchmann* v. *Meurice* (2) was the case of a judgment creditor seeking to obtain a charging order on his debtor's interest in shares, which was clearly not founded on a breach of contract. Logically there is no distinction between an action to enforce a security against an assignee of the equity of redemption and a similar action against the original mortgagor. At law when the mortgagor has failed to pay the mortgage debt the mortgagee becomes the absolute owner of the property comprised in the security. But when he seeks to enforce his security equity imposes the restriction of the mortgagor's right to redeem. The foreclosure action is an action by the mortgagee to make the property his own by putting an end to the equitable restriction upon his absolute right. Under the old practice a bill for foreclosure could not have been said to be founded on a contract. The order appealed from is wrong.

Owen Thompson, for the respondent. The action in this case is founded upon a breach by the original mortgagors of their covenants in the mortgage deed. In *Deutsche National Bank* v. *Paul* (1) there was no privity of contract at all between the parties, and therefore there could be no breach; so in *Kolchmann* v. *Meurice* (2) there was no contractual relation between the parties. If there were no breach of the covenant to pay the mortgagee would not be entitled to foreclosure. Where there is a loan of money at interest there is always an implied contract to repay, so that it matters not whether the mortgage deed contains an express covenant to pay or not.

(1) [1898] 1 Ch. 283. (2) [1903] 1 K. B. 534.

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The observations of Stirling L.J. in *Kolchmann* v. *Meurice* (1) must be confined to the particular case with which he was dealing. There was no contract there. The right to relief is founded upon an alleged breach within the jurisdiction of the agreement to repay the mortgage money. This case comes within the rule if its natural construction be put upon it.

COZENS-HARDY M.R. The plaintiff commenced this action by originating summons to enforce a mortgage security, and he has obtained an order for service of the summons upon the defendants, who are in Australia. The plaintiff is mortgagee and the defendants are mortgagors who entered into a covenant for payment of the mortgage debt. The property comprised in the mortgage does not include any land within the jurisdiction. It is purely an interest in personal estate. The question, therefore, really turns upon this: whether the action is one "founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." This is a proceeding in which no relief could be given, or is sought, in the shape of a personal order for payment. It is clear that such relief could not be granted by originating summons like this. It is merely an action in which the defendants are, by the process of the Court, called upon either to redeem within a certain time, or to be for ever foreclosed. Is that an action founded on a breach or an alleged breach of a contract within the jurisdiction? I think not. It has been held by this Court of Appeal, in a case which is binding upon us, *Kolchmann* v. *Meurice* (1), as had previously been held by Stirling J. in *Deutsche National Bank* v. *Paul* (2), that this sub-s. 1 is not applicable to a case in which foreclosure is sought against a defendant who is not in any contractual relation with the plaintiff. In other words, whatever may have been the intention of the makers of the rule, it does not apply to a very large number of foreclosure suits. It would not apply where there has been any transfer by the mortgagor of his interest. It would not apply where there had been second

(1) [1903] 1 K. B. 534. (2) [1898] 1 Ch. 283.

mortgagees who also wanted to foreclose, or where there is no contractual relation either between the assignee and the mortgagor, or between the plaintiff and the second mortgagees, or other mortgagees behind him. There being this casus omissus in the rule, and we are bound to hold there is one, is it possible to draw any distinction logically between the case of an original mortgagor and his covenantee, and those other cases which I have mentioned? I think not. The words "founded on any breach or alleged breach of the contract" are words which are not found anywhere else in the Rules; but I think they must mean this: an action in which you cannot get any relief unless you proceed upon and are dependent upon a contract. In the present case the relief granted would be identical if there had been no covenant by anybody to pay, for mortgages without any covenant to pay are quite well known, not so frequent as others, but perfectly lawful; and there are many instances of them in the books. But the form of relief is exactly the same, whether there is or is not a covenant to pay.

I, therefore, am bound to say that, having regard to the decision of this Court in *Kolchmann* v. *Meurice* (1), we must hold that the learned judge was wrong in treating this as an originating summons which could properly be served out of the jurisdiction. That being so, the order for service must be discharged with the usual consequences as to costs.

FARWELL L.J. I have come to the same conclusion. An originating summons for foreclosure is in the same position as a bill to foreclose in the old Court of Chancery. It is quite clear that the equitable claim in a bill for foreclosure was not founded on contract at all. It was a bill issued by the mortgagee to relieve him, the plaintiff, from the bar which the Court had interposed between him and his absolute, full legal rights. That being so, the case does not come within the rule, and I do not see that we can properly extend it, although I hope that the Rule Committee will soon amend it.

I agree that this appeal succeeds, and that we are bound by authority.

(1) [1903] 1 K. B. 534.

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HAMILTON L.J. I agree. As soon as it is admitted that a mortgage and a foreclosure action may equally exist whether there is or is not a personal covenant to pay, it seems to me to follow that an action or other proceeding for foreclosure cannot be said to be founded on any breach or alleged breach of a contract, which, "according to the terms thereof, ought to be performed within the jurisdiction." We cannot say that an action is founded on a breach of a contract to pay, to which the existence of a contract to pay is not essential, and which is equally valid, whether it is founded or not founded upon any contract, or any breach of it. I think that in all probability the word "founded" is used in the rule in order to make it quite clear that this does not apply only to proceedings for damages, which might have been supposed to be the effect if the words had been "the action is for any breach or alleged breach within the jurisdiction of any contract." The words are not, as it is rather suggested that they might be read, "an action founded on a contract of which there has been a breach"; nor indeed is this action founded on a contract. If it had been intended to include within these words all actions of foreclosure, one would have thought the expression should have been "the action is preceded by or connected with"; and even then the observation would still arise, that such words would not cover the case of a foreclosure proceeding in respect of a mortgage which did not contain a covenant to pay. The argument that one ought not lightly to presume that there is any casus omissus to be found in the Rules, which is a forcible argument, is inapplicable, because we are bound by authority to recognize that there is one, namely, that covered in *Kolchmann* v. *Meurice* (1); and if there is one we certainly cannot, for the sake of preventing another, put any pressure upon the words of the rule.

Solicitors: *Pritchard, Englefield & Co.; Peacock & Goddard.*

(1) [1903] 1 K. B. 534.

G. A. S.

ORAM *v.* HUTT.

SWINFEN EADY J.

[1912 O. 148.]

1912

Nov. 25, 26.

Maintenance of Suit—Common Interest—Trade Union—Slander on Officer as such—Action by Officer—Indemnity by Union against Costs—Ultra vires.

A trade union has no legal common interest in a slander action brought by one of its officers, although that officer is slandered by way of his office as well as personally and the union is thereby adversely affected.

Payment of the officer's costs out of the funds of the union in pursuance of an indemnity given by the union before action is therefore obnoxious to the law of maintenance and ultra vires.

Alabaster v. *Harness* [1895] 1 Q. B. 339, 341, 344, and *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1906) 22 Times L. R. 274, 275, applied.

WITNESS ACTION.

The plaintiff was a member of the Warwickshire Miners' Association, a trade union registered under the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22).

The defendants Hutt and Johnson were members of the executive committee in 1907 and 1908 and were sued on behalf of themselves and the other members of the committee during those years. The defendants Sanders, Jaques, Golby and Warrington were trustees of the association in 1908 and were sued as such. The remaining trustee Boulstridge had died on December 27, 1911, before the writ was issued.

The objects of the association as defined by rule 4 were:

"i. To raise funds by contributions, donations and levies, for mutual help.

"ii. To try for improved enactments for more efficient management of mines, quarries, whereby the health and lives of members may be protected.

"iii. To secure the prices and wages bargained for by the members, and to protect them when unjustly dealt with by the employers or manager.

"iv. To obtain compensation for accidents where the employers are liable.

"v. To regulate the hours of labour.

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"vi. To secure the true weight of the material sent to bank by the miners.

"vii. To provide a weekly allowance for the support of members and their families who may be unjustly locked out or on strike.

"viii. To improve the intellectual, moral and social condition of its members.

"ix. To assist similar associations that have the same objects as are herein stated.

"x. The whole of the moneys received by this association shall be applied in carrying out the foregoing objects according to rules. Any officer misapplying the funds shall be prosecuted and be excluded from all benefits."

Rule 6 (general management) provided that the supreme government should be vested in a council consisting of a president, secretary, treasurer, and one member duly elected (as representative) by and from each lodge composing the association; but no lodge with less than twenty financial members should be entitled to a representative on the council, but might be represented by the nearest lodge.

Rule 17 (election of executive committee and their duties) as amended November 21, 1889, provided that there should be an executive committee always in existence composed of the president, general secretary, general treasurer, and seven experienced members of the association (six to form a quorum) nominated as therein mentioned. They should be called together in all cases of emergency occurring between the meetings of council and take into consideration all important complaints and grievances unexpectedly arising between the employers and lodges which called for their immediate attention; they should collect all facts bearing upon such cases and should thoroughly examine all the circumstances connected with the case at issue, when they should have power to advise as to the best means of settling or arranging all such complaints and thus preventing disputes; but should not take any steps contrary to the rules of the association.

Rule 19 (election of trustees and their duties) provided that for the purpose of securing the permanency of the association and the safety of the funds there should not be less than three

trustees appointed in whose names and by whom all securities, investments, and purchases in connection therewith should be made. No money should be withdrawn without their signatures. They should zealously guard the interests of the association and see that no moneys were paid contrary to rule.

In 1907 Pat McNicholas, a member who was suspicious as to the accounts of the association, which he wished to have audited by chartered accountants, made various inflammatory speeches at public meetings in which he accused various officers and particularly Johnson, the general secretary, of misconduct in the affairs of the association. He purported to make these speeches in the interests of the association. He said (inter alia) "If the union is carried on in a straightforward manner I can't understand why he"—Johnson—"should be so bitter about having chartered accountants." Referring to the balance-sheet he said "I say straight out that this is a false document," and again, "I have reason to believe we are 4000*l.* to 8000*l.* deficient on the balance-sheet and that is why we should have chartered accountants to audit the books," and again, "I think you have had your eyes opened a little and if you will have the pits balloted it will come out and we shall have the books audited for the last ten years, and then I am quite sure we shall get from 12,000*l.* to 30,000*l.* back again to the funds of the association. I am quite sure there is 12,000*l.* we could put our hands on, if we will only be true to ourselves." He also said "I know he"—Johnson—"is a scoundrel to the backbone. . . . . I am not going to say that Mr. Johnson is robbing us of money, but you know he is robbing us of our rights, that is the rights of knowing where our money is gone. If Mr. Johnson is not robbing us he says all the money we have given him he has given away. . . . . It seems strange that when Mr. Johnson started as secretary for the Warwickshire Miners' Association he had no money and to-day I believe he is one of the richest men in Bedworth." He also accused various lodges including the Newdigate lodge of not accounting for moneys received, and wrote a libel concerning Dewis, the Newdigate lodge secretary.

These speeches produced a widespread feeling of unrest among the members and threatened unless refuted to impair the

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efficiency if not the existence of the association. Many members refused to pay their contributions.

In these circumstances the executive committee passed the following resolution on May 16, 1907:—"Resolved that the Miners' Association, the general secretary, the executive committee and any of the lodge officials take legal proceedings against Pat McNicholas on behalf of the Miners' Association or in their own names and that the Miners' Association indemnify the general or lodge officials who take proceedings." This resolution was confirmed by the council on June 24, 1907.

In consequence of and in reliance on this resolution Johnson, the general secretary, commenced an action for slander on May 16, 1907, and Dewis, the Newdigate lodge secretary, commenced an action for libel and slander on May 17, 1907.

The solicitor of the association acted for the plaintiffs in both actions.

In his statement of claim Johnson stated that as general secretary of the association it was his duty to keep an account of all moneys received and expended and to prepare the balance-sheets. He then set out the slanders which he alleged were spoken "of the plaintiff and of the plaintiff in the way of his said office" and meant that he was corrupt, dishonest, incompetent and negligent in the discharge of his duties as secretary, that he was indifferent and disloyal to the interests of the association and its members and unfit to be its secretary, that he had prepared and published a false balance-sheet, and that he had robbed and embezzled and aided and abetted other officials in robbing and embezzling the funds of the association. He then alleged that "By reason of the premises the plaintiff has been injured in his credit and reputation and has suffered damage," and he claimed damages.

His action was heard on February 19, 20, 21 and 24, 1908, and he recovered 1000*l.* damages and costs. A consent judgment for 25*l.* without costs was then entered for Dewis, whose action was framed on similar lines. Immediately after judgment McNicholas promised the Court to stop his inflammatory speeches. For a time, however, he went on with his attacks, but having regard to the result of the trial his supporters soon fell away and he left the neighbourhood.

Pending the actions a sum of 174*l.* cash had been paid by the treasurer to the solicitor out of the funds of the association on account of costs. On July 10, 1908, nothing being recoverable from McNicholas, a sum of 775*l.* cash, the balance of 949*l.* the plaintiffs' costs in the two actions, was paid by the treasurer to Johnson out of the funds of the association, and Johnson gave the solicitor a cheque for the same amount. These payments were made out of income in the treasurer's hands which had not been paid over to the trustees. The payments were not sanctioned by any specific resolution, as it was considered that the resolution of May 16, 1907, was sufficient.

In this action the plaintiff originally asked for a declaration that the payments were ultra vires and an order for repayment by all the defendants, but on it appearing that neither Hutt nor the trustees had in fact made any payment, the plaintiff merely asked for a general declaration against all the defendants and an order for Johnson to repay the 775*l.*

Hon. E. C. Macnaghten, K.C., and *Dighton Pollock*, for the plaintiff. The payments were clearly ultra vires. The association is a trade union registered under the Trade Union Acts, 1871 and 1876.

Sect. 8 of the earlier Act provides for the property being vested in trustees.

Sect. 9 provides that the trustees or any other officer authorized so to do by the rules are empowered to bring or defend or cause to be brought or defended any action in any Court of Law or Equity touching or concerning the property right or claim to the property of the trade union.

Sect. 10 provides that a trustee shall be liable only for the moneys which shall be actually received by him.

Sect. 14 provides that the rules shall contain provisions in respect of the several matters mentioned in the First Schedule, which includes (clause 2) "The whole of the objects for which the trade union is to be established, the purposes for which the funds thereof shall be applicable, and the conditions under which any member may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any

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member of such trade union." The rules must therefore embody all the objects exhaustively, and the association cannot travel outside them: *Yorkshire Miners' Association* v. *Howden* (1); *Amalgamated Society of Railway Servants* v. *Osborne.* (2)

In the present case the objects set out in rule 4 probably cover legal assistance in compensation cases or in obtaining payment of wages, but there is nothing to justify the provision of legal assistance in outside matters, such as defending a tort committed by an officer—*Alfin* v. *Hewlett* (3)—or maintaining a slander action on his behalf: *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks.* (4) If the speeches reflected on the association itself in the conduct of its business, it could have sued for slander: *South Hetton Coal Co.* v. *North-Eastern News Association.* (5) But it was not entitled to maintain slander actions brought by its officers in which the only issue was whether the individual plaintiffs had suffered damage. The association had no common interest in "the thing in variance" in those purely personal actions—*Alabaster* v. *Harness* (6)—and the provision of legal assistance was consequently obnoxious to the law against maintenance.

Hon. Frank Russell, K.C., and *J. W. Manning*, for the defendants. We cannot justify these payments under rule 4. But the objects stated in that rule are obviously not exhaustive, as they do not provide for the payment of the costs of an action by or against the association itself. The payment of the costs of such an action would clearly be justified.

In the present case the slander actions were really brought on behalf of the association, and if the 1000*l.* had been paid Johnson would have held it as trustee for the association.

[SWINFEN EADY J. That is not consistent with the record. He was suing for defamation of his own character and obtained damages on that footing. Slander on the association was not in issue.]

It was virtually in issue, as he was slandered personally and in the way of his office. The suggestion that the association

(1) [1905] A. C. 256, 262.
(2) [1910] A. C. 87, 94.
(3) (1902) 18 Times L. R. 664.
(4) 22 Times L. R. 274, 275.
(5) [1894] 1 Q. B. 133.
(6) [1895] 1 Q. B. 339, 341, 344.

was not being carried on in a straightforward manner and that the balance-sheet was false were slanders on the association as well as on Johnson.

[SWINFEN EADY J. Why did not the association sue?]

It was considered simpler for Johnson and Dewis to sue and that their actions would effectually stop the slanders.

[SWINFEN EADY J. Can you say that the association had any common interest in those personal actions?]

Possibly no direct technical common interest. But the actions were really brought for the benefit of the association with the sole view of stopping the slanders, so that the association had a strong indirect common interest in them. In *Alfin* v. *Hewlett* (1) Joyce J. held on the evidence that it was not in the interest of the society to undertake to defray the costs of the secretary's separate defence which was not vital to the interests of the society. *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (2) was a case of pure maintenance, the union having no scintilla of interest in the libel action.

In the present case the actions were brought for the benefit of the association as well as the plaintiffs and the association was justified in paying the costs. A trustee who brings or defends an action for the benefit of the trust estate is allowed his costs out of the estate even though at the same time he clears his personal character from charges of fraud: *Walters* v. *Woodbridge*. (3) The present case is very analogous.

Hon. E. C. Macnaghten, K.C., in reply. The indirect benefit that the association might derive from the slander actions was not a sufficient common interest to take the case out of the law against maintenance, and if there was any arrangement that the association was to receive the damages, it was guilty of champerty. The payments were clearly ultra vires, and we ask for a declaration against all the defendants, but as it does not appear that Hutt or the trustees actually made any payments we only ask for an order for repayment against Johnson in respect of the 775*l.* he actually received.

(1) 18 Times L. R. 664. (2) 22 Times L. R. 274, 275.
(3) (1878) 7 Ch. D. 504.

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SWINFEN EADY J. (after stating the facts). It is contended that the payment of the 174*l.* and 775*l.*, amounting to 949*l.* the plaintiffs' costs of the slander actions, was ultra vires.

In *Yorkshire Miners' Association* v. *Howden* (1) Lord Macnaghten points out that "The Trade Union Act, 1871, requires that the rules of every registered trade union shall contain provisions in respect of the several matters mentioned in the First Schedule to the Act. Among those matters are included 'the whole of the objects for which the trade union is established,' and 'the purposes for which the funds thereof shall be applicable.'" Then after referring to the particular rules in that case he says: "It is, therefore, beyond the powers of the association to apply its funds, or any part of them, to any purpose not authorized by its rules."

The objects of the present association are set out in rule 4, clauses i. to ix., and clause x. provides that "The whole of the moneys received by this association shall be applied in carrying out the foregoing objects according to rules. Any officer misapplying the funds shall be prosecuted and be excluded from all benefits." Therefore according to the tenor of the rules the whole of the moneys received by the association must be applied in carrying out the objects set forth in rule 4. It is not contended that the payment of the costs of these actions, though brought by officers of the association for slander, was within the rules. But it is urged that the actions were really brought for the benefit of the association, and it would be taking too narrow a view to hold that the payment of the costs was not a proper application of the funds.

Now it would be within the provisions of the law against maintenance for one person to assist another by money in the conduct of legal proceedings unless that person had a common interest therein, or unless the case fell within the other established exceptions, which latter point was not contended.

In *Alabaster* v. *Harness* (2) Lord Esher M.R. says: "This appears to me to be a perfectly clear case. The action against the defendant is for maintenance of Dr. Tibbits in an action brought by him against the plaintiffs. The action so brought by

(1) [1905] A C. 256, 262. (2) [1895] 1 Q. B. 339, 341, 344.

Dr. Tibbits was an action for a libel on himself. Such an action is a personal action, which in point of law only concerns the person who brings it. The matters legally at issue in it are whether the plaintiff has been libelled, and, if so, to what damages he is entitled in respect of the libel upon himself. It has nothing whatever to do with any libel that may have been published of some other person, or damages for such libel." Lopes L.J. says: "I entirely agree with the elaborate judgment given by Hawkins J. in the Court below. (1) The defendant in this case was, in my opinion, clearly guilty of maintenance. The grounds on which the law against maintenance is based are well defined by Lord Abinger C.B., in *Prosser* v. *Edmonds* (2), where he says: 'All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.' It is said that in this case the defendant was justified in his maintenance of Dr. Tibbits' action because he had a common interest with him. In my opinion, he had no such common interest as could justify his interference in the action. In order to justify such interference on the ground of common interest, I think there must be some interest recognized by the law in what is called by Hawkins in his Pleas of the Crown 'the thing in variance'; by which I understand an interest in the subject-matter of the action at issue between the parties. In my opinion, there must be some legal, as distinguished from a sentimental, interest in the result of the action about to be tried, or in some question at issue between the parties in the action. The matter in issue in the action brought by Dr. Tibbits was whether the plaintiffs had libelled him. No question arose as between the defendant and the plaintiffs."

Every word of the above is applicable to the present case. The association had no legal as distinguished from a sentimental interest in the result of the slander actions. The issue in each action was whether the plaintiff had been injured in his credit and reputation, and if so to what damages he was entitled in respect of the slander upon himself. The association had no direct

(1) [1894] 2 Q. B. 897. (2) (1835) 1 Y. & C. Ex. 481, 497.

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interest in the thing in variance in either action. Each plaintiff was suing for himself, and the damages if any recovered would have belonged to him personally and not as trustee for the association.

The defendants in terms said that they could not claim a direct technical common interest in the thing in variance, but they urged that the actions were really brought for the benefit of the association, because so long as McNicholas' statements were spread broadcast the members were either leaving or omitting to pay their contributions, so that it was necessary to stop the slanders, or the association would have come to an end. But though the result of the actions was in the end to rid the neighbourhood of McNicholas, I cannot take that indirect result into account as enabling the association to pay the costs of those actions. The mere fact that the association derived an indirect benefit from actions brought by other persons did not entitle it to pay the costs of those persons out of its own funds.

A similar point arose in *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1), and Lord Alverstone C.J. said: "The limits within which a trade union might legitimately give legal aid to its members in protection of their interests on the ground of common interest could not be stretched to cover a case of alleged libel without contravening the principles laid down in the case of *Alabaster* v. *Harness*." (2)

The payment of these costs out of the funds of the association was therefore ultra vires, and there will be a declaration to that effect against all the defendants. As to the claim for repayment it appears that the 174*l.* was paid by the treasurer direct to the solicitor, and the plaintiff is satisfied with judgment against Johnson for the 775*l.* actually paid by the treasurer to him. Having this money of the association in his hands he applied it in payment of costs, which was ultra vires, and he is consequently liable to replace it. It was not established that the other defendants had made any payment, and as against them the plaintiff is content to take the above declaration. There will therefore be a declaration against all the defendants that the payments of the 174*l.* and 775*l.* were ultra vires, and an order against Johnson

(1) 22 Times L. R. 274, 275.

(2) [1895] 1 Q. B. 339, 341, 344.

for repayment of the 775*l.* with 4 per cent. interest from July 10, 1908, the date of payment.

Johnson must pay the plaintiff's costs. The other defendants will bear their own costs.

Solicitors: *Maude & Tunnicliffe, for Simpson, Bowring & Smith, Derby; Bennett & Ferris, for W. H. Pownall, Nuneaton.*

N.B.—A full discussion of the modern law of maintenance will be found in *British Cash and Parcel Conveyors, Ld.* v. *Lamson Store Service Co., Ld.* [1908] 1 K. B. 1006.

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ADAMS *v.* URSELL.

[1912 A. 1680.]

Nuisance—Injunction—Fried Fish Shop.

A fried fish shop, carried on in close proximity to a dwelling-house, may cause an actionable nuisance, and will be restrained if the evidence shews that the odour causes "an inconvenience materially interfering with the ordinary comfort physically of human existence" within the definition contained in the judgment in *Walter* v. *Selfe* (1851) 4 De G. & Sm. 315.

THIS was an action to restrain a nuisance caused by a fried fish shop.

The plaintiff was a veterinary surgeon who had resided with his wife and child, and carried on his business, in a house called Henlow House, in Silver Street, Dursley, from the year 1905, and had purchased the freehold of the house in 1907. Early in November, 1912, the defendant entered into possession of premises in Silver Street adjoining the plaintiff's house, and commenced carrying on the business of a fried fish shop. The frying of fish went on daily between 11.30 A.M. and 1.30 P.M., and between 6.30 and 10.30 P.M. The plaintiff gave evidence that the odour caused by frying the fish pervaded every room of his house and affected the flavour of butter in his larder; and that the vapour from the defendant's cooking stove appeared in the plaintiff's house like a fog or mist. This was corroborated by his wife and friends who were frequently in his house. It was proved that

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all the neighbours within a radius of sixty yards of the defendant's shop, except one, had joined in a petition to the Dursley Rural District Council to get the nuisance abated. The council sent their medical officer to report, and he reported that he had noticed the smell at considerable distances varying with the state of the weather, but that there was no nuisance within the meaning of the Public Health Acts.

The defendant produced affidavits by himself, his landlord, one neighbour, who was a tenant of the same landlord, and two persons engaged in the fried fish business, who did not say there was no smell, but dwelt on the fact that the defendant used the best form of grate and appliances, kept his shop very clean, used fresh fish, and took great pains to avoid causing a smell, and that the smell was very slight and did not amount to a nuisance. The fried fish business was a large one, the takings being 30*l.* a week.

It was stated in the evidence filed by the defendant that Silver Street was in the lowest district of Dursley. It appeared that there were works in the neighbourhood and the residents, for the most part, belonged to the working classes, but that the plaintiff's house and others near it were of a much better character.

Micklem, *K.C.*, and *Harman*, for the plaintiff. The facts proved shew an interference with the ordinary comfort and enjoyment of life and property, and that is enough to entitle the plaintiff to an injunction.

Owen Thompson, for the defendant. There is no reported case in which the carrying on the business of a fried fish shop has been restrained as a nuisance.

[SWINFEN EADY J. It is within my own recollection that Kay J. granted an injunction in the case of a fried fish shop, but I believe the case was not reported.]

Nuisance was defined by Knight Bruce V.-C. (as he then was) in *Walter* v. *Selfe* (1) as "an inconvenience materially interfering with the ordinary comfort physically of human existence." The evidence does not bring the inconvenience caused anywhere near that definition. In *Tod-Heatly* v. *Benham* (2), which turned on

(1) 4 De G. & Sm. 315, 322. (2) (1888) 40 Ch. D. 80.

the construction of a covenant, nuisance is distinguished from annoyance; and the judgments in *St. Helen's Smelting Co.* v. *Tipping* (1) make the same distinction. It cannot be denied that there is some smell, but it has been found that it is not injurious to health; and the result of the evidence is that it merely causes annoyance to the plaintiff, for which the law gives no remedy, and does not amount to a nuisance.

Again, *St. Helen's Smelting Co.* v. *Tipping* (1) and the recent case of *Rushmer* v. *Polsue & Alfieri, Ld.* (2) shew that the character of the neighbourhood must be taken into consideration. It is proved that there are large works in the neighbourhood, and that it is principally inhabited by the working classes. It would be a great hardship both to the defendant and to the work-people who come to his shop for food to stop him carrying on the business there.

SWINFEN EADY J. (after going through the evidence and stating the facts as above). I must accept the plaintiff's evidence that the smell caused by the frying of fish pervades the house and makes it very uncomfortable. In *Tod-Heatly* v. *Benham* (3) Bowen L.J. said: "If guided strictly by the common law, we know what nuisance is . . . . that is in the language of Vice-Chancellor Knight Bruce in *Walter* v. *Selfe* (4) 'an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.'" Applying that rule here I have no doubt that the plaintiff has proved that having the odour pervading his house is an intolerable inconvenience, and in my judgment he has made out a case of nuisance at common law. It was urged that an injunction would cause great hardship to the defendant and to the poor people who get food at his shop. The answer to that is that it does not follow that the defendant cannot carry on his business in another more suitable place somewhere in the neighbourhood. It by no means follows that because a fried fish shop is a nuisance in one place it is a

(1) (1865) 11 H. L. C. 642.
(2) [1906] 1 Ch. 234.
(3) 40 Ch. D. 80, 97.
(4) 4 De G. & Sm. 322.

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nuisance in another. The evidence shews that the defendant supplies fresh fish and has the most approved appliances; but a case is none the less made out, and I must grant an interlocutory injunction restraining the defendant from carrying on his fried fish business on the premises which he now occupies. It will not extend to the whole street as asked.

Solicitors: *Helder, Roberts, Walton & Giles, for Frank Treasure, Gloucester; Winterbotham & Miall, for Earengey & Pruen, Cheltenham.*

J. R. B.

Observations of applied. SWINFEN EADY, J., *Re* CRANSTOUN'S WILL TRUSTS. [1949] 1 All E.R. 871.

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In re YOUNG.
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[1912 Y. 707.]

Legacy—Disclaimer—Right to retract—Trust Legacy—Successive Life Interests—Refusal by First Life Tenant to receive Income—Payment to Second Life Tenant—Death of Second Life Tenant—Right of First Life Tenant to Retract Refusal quoad Future Income.

Trustees accepted and held a trust legacy in trust for the plaintiff for life and after her death for her son for life and after his death for the residuary legatees, but the plaintiff, being annoyed at the terms of the will, refused to receive the income, and with her consent it was paid to her son.

On the death of her son eight years later the plaintiff retracted her refusal quoad future income.

The residuary legatees took the view that the plaintiff's refusal amounted to a disclaimer of her interest in the legacy and could not be retracted:—

Held, that the plaintiff's refusal to receive the trust income could not be treated on the footing of disclaimer of a legacy, and that, as neither the trustees nor residuary legatees had changed their position on the faith of that refusal, it could be retracted quoad future income.

Semble. Notwithstanding the passage in Sheppard's Touchstone, 7th ed. p. 452, an actual disclaimer, until acted on, may be retracted.

ORIGINATING SUMMONS.

By her will dated March 4, 1904, a testatrix, after appointing the defendants Young and Reece her executors and trustees and bequeathing a pecuniary legacy, devised and bequeathed her real and personal estate to her trustees upon trust for sale and

conversion and directed that they should out of the proceeds pay her funeral and testamentary expenses, debts and legacies, and all death duties in respect of legacies (which she declared were to be paid and enjoyed free of such duties), and in the next place should set apart 1000*l.* and invest the same and stand possessed thereof upon trust to pay the income to the plaintiff for life for her separate use and after her death to the plaintiff's son for life, and after his death the testatrix directed that the capital and income should fall into residue.

The testatrix died on March 20, 1904, and the sum of 1000*l.* was in due course set apart and invested in the names of the trustees.

On May 9, 1904, the plaintiff, who was annoyed with the terms of the will, wrote to the defendant Young saying that she preferred to have no interest whatever in the will.

On October 7, 1904, the defendant Reece, the other executor and trustee, who was acting as solicitor for the executors and trustees, forwarded a cheque for the interest then due.

On October 8, 1904, the plaintiff replied returning the cheque and saying, "I made it very plain I think to you and Mr. Young that I have no interest whatever in Miss Young's will and wish for none, so please do not let me be troubled further."

The income was then paid with the plaintiff's consent to the plaintiff's son, whose interest was treated as accelerated, and the Inland Revenue accepted duty on the son's interest as an interest in possession without requiring duty on the plaintiff's interest.

The plaintiff's son died on January 17, 1912.

On May 3, 1912, the plaintiff wrote to the defendant Reece raising the question as to her right to the income, and on June 10, 1912, the plaintiff's solicitors wrote to the defendant Reece making a formal demand for the income since the death of the plaintiff's son.

The residuary legatees taking the view that the plaintiff had disclaimed her interest in the legacy and could not retract her disclaimer, this demand was not complied with, and on November 1, 1912, the plaintiff issued this summons for an order directing the defendant trustees to pay her the income for the rest of her life. As the defendant Young was a residuary legatee

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as well as a trustee, the other residuary legatees were not made parties.

The evidence shewed that the plaintiff was desirous that her son's income should be increased as far as possible and that the income had been paid to him with her consent, but that was not her real reason for refusing it herself. Her real reason was that she was smarting with a sense of annoyance at the terms of the will, which only gave herself and her son life interests instead of a capital sum which the testatrix had led her to expect.

T. T. Methold, for the plaintiff. The true view of the facts is that the plaintiff merely gave up her life interest during her son's life. His interest was accelerated: *Eavestaff* v. *Austin* (1); *In re Scott.* (2) But assuming she gave up her life interest altogether in favour of her son and the residuary legatees, it was a purely voluntary act without any consideration, and the residuary legatees, who have not changed their position in any way on the faith of that act, cannot enforce the gift: *Marler* v. *Tommas* (3); *In re Earl of Lucan* (4); *In re Ellenborough.* (5)

[SWINFEN EADY J. Can the disclaimer of a legacy be retracted?]

Certainly, unless and until the disclaimer has been acted on.

W. A. Peck, for the defendants. A grant, devise, or bequest refused by a grantee, devisee, or legatee becomes ipso facto void: Sheppard's Touchstone, 7th ed. pp. 258, 452; Davidson's Conveyancing, 3rd ed. vol. v. pt. ii. pp. 661 to 666; *Mallott* v. *Wilson* (6) (disclaimer of a grant). It cannot therefore be set up again by retractation.

[SWINFEN EADY J. In the Ecclesiastical Courts the renunciation of an executor might be retracted at any time before administration granted: Williams on Executors, 9th ed. p. 233; 10th ed. p. 205. That liberty was to some extent curtailed by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 79. But that does not affect legatees. Why should not the disclaimer of a legacy be withdrawn if there has been no change of position among the parties interested?]

(1) (1854) 19 Beav. 591.
(2) [1911] 2 Ch. 374, 377.
(3) (1873) L. R. 17 Eq. 8.
(4) (1890) 45 Ch. D. 470.
(5) [1903] 1 Ch. 697.
(6) [1903] 2 Ch. 494, 501.

Because the disclaimer makes the legacy void ab initio and nothing can set it up again.

Cur. adv. vult.

Jan. 24. SWINFEN EADY J. (after stating the facts). The plaintiff is now willing and desirous of receiving the income for the rest of her life.

This much is clear and undisputed. Her refusal to receive the income at the time was a voluntary act on her part for which she received no consideration. It is also clear that there has been no change of position as regards the trustees or residuary legatees. It is not suggested that any payments already made to the plaintiff's son should be disturbed.

The plaintiff puts her case in this way: "Here is a trust fund in the hands of the trustees, which under the trusts of the will is to be held upon trust for me for life. It is true that I refused to receive the income and with my consent it was paid to my son. He is now dead and I want the income. I did not receive any consideration for giving up the income. I did not release my life interest. No one will be prejudiced by what I have done. The residuary legatees will obtain the capital at my death. No one has changed his position on the faith of what I have done, as I do not seek to disturb any past payments under the trust, but only claim the income from my son's death."

It was not in fact suggested that there had been any change of position or that the residuary legatees had lost or given up any rights by the fact of the income being paid to the plaintiff's son.

The effect of the plaintiff's refusal to receive the income was to accelerate her son's interest: *Eavestaff* v. *Austin.* (1) In that case a testatrix directed that so much of a sum of 4500*l.* as would produce 100*l.* a year should be set apart by her trustees and the 100*l.* a year paid to her granddaughter Adelaide for life and "after her death" the same should be equally divided between the children of the testatrix's nephew John. It will be observed that the gift to John's children was only after the death of Adelaide. The testatrix subsequently revoked Adelaide's life

(1) 19 Beav. 591.

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annuity. The question was whether the bequest to John's children was accelerated or whether the income during Adelaide's life fell into residue. Sir John Romilly M.R. held that the bequest was accelerated, and there has been no contention to the contrary in the present case.

The defendants' real contention was that a bequest refused by a legatee must be treated as void. They relied on a passage in Sheppard's Touchstone, 7th ed. p. 452: "If one devise his land to another in fee simple, fee tail, for life, or years, and the devisee after the death of the testator doth refuse and wave the estate devised to him; in this case, and by this means, the devise is, [as to him,] become void. [And, by the refusal of a particular estate, the remainder will be accelerated; and an intended remainder may be converted into an executory devise.] And it seems a verbal waver is sufficient in this case. [The general practice is to execute a deed of disclaimer, as distinguished from a release. *Crewe* v. *Dicken.* (1)] So if one give goods or chattels to another, and the devisee refuse it; by this means the devise is become void, and any waver or refusal will suffice in this case: for a man shall not be compelled nolens volens to take a thing devised to him [3 Prest. Abstr. 104.]"

They contended that this passage shews that a bequest becomes void on the refusal of the legatee to receive it and cannot be restored by retractation of that refusal.

The first answer is that the whole gist of the passage is that a legatee is not compelled to take a bequest against his will. It does not in any way deal with the question whether his refusal may or may not be retracted.

The second answer is that the present case ought not to be dealt with on the footing of refusal of a legacy. The trust was duly created, and the fund bequeathed was set apart, received, and invested by the trustees and became a trust fund. There was no question of refusal of that bequest. The trustees accepted the money and held it in trust. For a time with the plaintiff's consent they paid the income to her son. Now that he is dead the plaintiff says that she merely voluntarily relinquished her right to the income for the time being, but

(1) (1798) 4 Ves. 97.

never gave up her life interest, to which she says she is still entitled. I think that is the true legal position and that the plaintiff is entitled to the income from her son's death.

Solicitors : *Rawle, Johnston & Co.; C. Howard A. Reece.*

G. R. A.

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SIMPSON, *Re*, 277; 108 L.T. 317). Followed. *Re* BURDEN .. [1948] 1 All E.R. 31 Also [1949] 1 Ch. 160.

MPSON.

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Jan. 22, 29.

CLARKE *v.* SIMPSON.

[1912 S. 3392.]

Settled Land—Leasehold House—Specific Bequest—Rent and Outgoings to be paid out of General Estate—Sale by Life Tenant—Ordinary Application of Proceeds—Additional Allowance out of General Estate in respect of Rent and Outgoings—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 34, 51.

A testator bequeathed a leasehold house to his executors and trustees in trust to permit his wife to occupy the same during her widowhood, with a provision for payment of ground rent, rates, taxes and outgoings, execution of repairs, and performance of covenants out of the testator's general estate, it being his intention that his wife should be personally relieved therefrom.

The widow resided in the house for fourteen years from the testator's death, the outgoings, amounting to 160*l.* a year, being paid by the trustees. She then sold the house as life tenant under the Settled Land Act, 1882, and the trustees received the purchase-money :—

Held, that under s. 34 the proceeds of sale must be applied in paying the widow during widowhood such an annuity as would exhaust those proceeds, capital and income, in the remaining eleven years of the lease.

Askew v. *Woodhead* (1880) 14 Ch. D. 27, applied.

Held, also, that the widow was not entitled to be paid 160*l.* a year out of the general estate in lieu of the provision for payment of rent and outgoings, as that provision, being merely an extra benefit conferred on her to enable her to reside in the house, was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51, and consequently came to an end on the sale.

Observations of Buckley J. in *In re Trenchard, Trenchard* v. *Trenchard* [1902] 1 Ch. 378, followed.

In re Trenchard, Ward v. *Trenchard* (1900) 16 Times L. R. 525, not followed.

ORIGINATING SUMMONS.

By his will, dated June 4, 1898, a testator made the following specific bequest :—

"I give my leasehold dwelling-house known as Fairlawn

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situate in Westbourne Road Edgbaston aforesaid in which I now reside to my executors and trustees in trust to permit my said wife to occupy the same during her life if she shall so long continue my widow, my trustees paying the ground rent and all rates taxes and outgoings payable in respect of the said dwelling-house, doing all necessary repairs and observing and performing the covenants contained in the lease under which the same is held out of my general estate it being my wish that my said wife shall be personally relieved from the payment of the ground rent rates taxes and outgoings cost of repairs and the observance and performance of the covenants aforesaid; and I declare that from and after the decease or second marriage of my said wife (which shall first happen) the said dwelling-house shall fall into and form part of my personal estate."

The testator bequeathed 1000*l.* to his wife free of legacy duty. He devised and bequeathed his residuary real and personal estate to his trustees on trust for sale and conversion and directed them to hold the proceeds in trust to pay a life annuity of 80*l.* to his sister (since deceased) and to pay the residue of the income to his wife during her widowhood, but if the residuary income did not amount in any one year to 1200*l.* the deficiency was to be made up out of capital, it being the testator's intention that his wife should have 1200*l.* a year during her widowhood in addition to the other benefits she derived under the will.

The wife's annuity was reduced to 200*l.* on remarriage, and the residue, subject to legacies and annuities, was given to certain residuary legatees.

The testator died on August 4, 1898. He held the house for a term of ninety-nine years less six days, expiring in 1924, at a ground rent of 25*l.* The widow continued to reside in the house for about fourteen years, the outgoings, which with the 25*l.* ground rent amounted to about 160*l.* a year, being paid by the trustees. A portion of the widow's 1200*l.* a year had to be paid out of capital.

On April 24, 1912, finding the house too large for her, the widow gave the trustees the following notice:—

"Please take notice that I wish to give up the occupation of 'Fairlawn' and it is my desire that it should be sold as soon as

practicable. I would like to leave by Michaelmas next if possible, and I would like to have the opportunity of selling all or part of my furniture on the premises before I leave, so please make whatever provision is necessary for giving effect to my wish in this respect. I will concur in the sale if necessary."

On June 26, 1912, the property was put up for sale by auction, the widow being the vendor as life tenant under the Settled Land Act, 1882. The property was not sold at the auction, but on July 26, 1912, it was sold by private contract by the widow as life tenant for 450*l.*

On September 26, 1912, the purchase was completed, the widow assigning as life tenant, and the trustees merely joining to receive the purchase-money.

The widow claimed to be paid during her widowhood such an annuity as would exhaust the 450*l.* (less costs) in the eleven years remaining of the lease. She also claimed 160*l.* a year out of the general estate during the joint continuance of the lease and her widowhood.

The trustees issued this summons to determine her rights.

G. E. Tyrrell, for the trustees.

MacSwinney, for the widow. The widow is entitled under s. 34 of the Settled Land Act, 1882, to have the purchase-money applied so as to give her the like benefit she would have had from the lease. She is therefore entitled during widowhood to such an annuity as will exhaust those proceeds in the next eleven years: *Askew* v. *Woodhead* (1), a decision on the corresponding section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 74. She is also entitled to 160*l.* a year out of the general estate as an equivalent for the provision for payment of rent, rates, taxes, outgoings, and repairs. This provision was a legacy or annuity annexed to the house, and made her life tenant thereof free of all outgoings. She could have underlet it for the rest of the term under her statutory power at a high rent on a non-repairing lease free of rates, taxes, and outgoings, and she ought not to lose the equivalent of this benefit by a sale. The provision cannot be put an end to by a sale or lease

(1) 14 Ch. D. 27.

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under her statutory power, as any condition to that effect whether expressly inserted or implied by construction would have tended to induce her to refrain from exercising that statutory power or would or might have had that operation, and would consequently be void under the very far reaching provisions of s. 51.

Sect. 51, sub-s. 1, provides that, if in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of the Act, a provision is inserted

(1.) purporting or attempting, by way of direction, declaration, "or otherwise," to forbid a life tenant to exercise any power under the Act, or

(2.) attempting, "or tending," or intended,

(*a*) by a limitation, gift, or disposition over of settled land, or

(*b*) "by a limitation, gift, or disposition of other real or any personal property," or

(*c*) by the imposition of any condition, or by forfeiture, "or in any other manner whatever,"

(*a*) to prohibit or prevent him from exercising, or

(*β*) "to induce him to abstain from exercising," or

(*γ*) to put him into a position inconsistent with his exercising, any power under the Act, that provision, "as far as" it purports, or attempts, "or tends," or is intended to have, "or would or might have," the operation aforesaid, shall be deemed to be void.

Sub-s. 2 provides that for the purposes of the section an estate or interest limited to continue "so long only" as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

This provision falls within (*b*), (*c*) and (*β*) of sub-s. 1, clause 2. The attempted limitation of the benefit to personal occupation is void "as far as" that personal occupation is put an end to by exercise of the statutory power, and the benefit is in that case enlarged under sub-s. 2.

In *In re Trenchard, Ward* v. *Trenchard* (1) a testator gave his wife the use of his freehold residence Woodville, "so long as she shall desire to make it her personal place of residence and shall remain my widow, my estate to pay all rates, taxes, and outgoings in respect thereof, and to keep the house and grounds in tenantable repair."

The rates, taxes, outgoings, and repairs amounted to about 120*l.* a year.

Byrne J. held that the widow had the powers of a life tenant under the Settled Land Acts, and would not forfeit the benefits conferred upon her by the direction to pay rents and expenses on selling or leasing the house under those powers.

The same case subsequently came before Buckley J. in *In re Trenchard, Trenchard* v. *Trenchard* (2) in the following circumstances. The widow did not sell the house under her statutory powers, as a building scheme for the whole estate was in contemplation. She proposed to surrender her rights to the trustees in consideration of an annual payment. She estimated her total rights, rental value, rates, taxes, and outgoings at 350*l.* a year. The report does not separate the items, but taking 120*l.* as the rates, taxes, and outgoings, the rental value was about 230*l.*

The widow first asked 320*l.* a year for her rights, but subsequently offered to accept 275*l.* a year, an amount exceeding the rental value, and obviously exceeding the income she would have derived from the proceeds of sale of the house, but less than her estimated rights under Byrne J.'s order, which is correctly set out in the report. (3) The trustees were willing to accept this compromise, but were doubtful whether the widow would not forfeit her rights by ceasing to reside in this way, as Byrne J.'s order was limited to cesser of residence on sale or lease under the Settled Land Acts.

The widow contended that the condition as to residence was wholly void under s. 51, but Buckley J. held it was only void "as far as" it tended to induce her not to exercise her statutory powers. As, however, she might still have continued

(1) 16 Times L. R. 525. (2) [1902] 1 Ch. 378.
(3) [1902] 1 Ch. 379.

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to reside at a cost of 350*l.* a year to the estate, or might have sold under her statutory power, he sanctioned the compromise. This was the only point before him, and he did not in any way question Byrne J.'s order, which was then binding between the parties. I therefore submit that *In re Trenchard, Ward* v. *Trenchard* (1) was correctly decided and ought to be followed.

Charles Church, for the residuary legatees, on admitting the widow's rights under s. 34, was not called on with regard to s. 51.

SWINFEN EADY J. (after stating the facts). The widow, who sold the lease as equitable life tenant under the Settled Land Act, 1882, contends that under s. 34 she is entitled to have the purchase-money applied in such manner as will give her the like benefit as she might lawfully have had from the lease. This has now eleven years to run, and if the widow had remained in possession till it ran out she would have obtained the full benefit. As she is entitled to the like benefit under s. 34, she must be paid during her widowhood such an annuity as will exhaust the proceeds of sale, capital and income, in eleven years. If she outlives that term without remarrying she will obtain all. Otherwise she will obtain a proportion during her widowhood, and the residuary legatees will take what remains. This is the basis adopted in *Askew* v. *Woodhead* (2) and it is not disputed.

The widow, however, also asks for a further payment. She says that as she had a right to occupy the house free of ground rent, rates, taxes, outgoings, and cost of repairs amounting in all to 160*l.* a year, which were payable out of the general estate, she ought now to receive an annuity of that amount out of the general estate, which no longer has to pay the actual rent and outgoings. She contends that having regard to s. 51 this extra benefit conferred on her by the will cannot be put an end to by a sale under her statutory power.

In my judgment the provision for payment of rent and outgoings does not fall within s. 51 at all. It is merely an extra benefit conferred on the widow to enable her to reside in the house without the expense of these outgoings. It is true that while she was in occupation she was free from these outgoings,

(1) 16 Times L. R. 525. (2) 14 Ch. D. 27.

but I am of opinion that the provision conferring this extra benefit on her was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51.

In *In re Trenchard, Ward* v. *Trenchard* (1) Byrne J. apparently took a different view, but the observations of Buckley J. in *In re Trenchard, Trenchard* v. *Trenchard* (2), on a subsequent application in the same case, are more in accordance with my own view of the section. He says (3): "Suppose a disposition of property in favour of A. B. during life or widowhood with a gift over in case of failing to reside, followed by a proviso that for the purposes of the gift over cesser of residence upon sale shall not be deemed a cesser of residence, and suppose a power of sale given to A. B. with an interest for life or widowhood in the proceeds of sale. Such a provision would not tend to induce the tenant for life not to sell. On the contrary, it would rather induce a sale. If she sold she would be entitled to the income of the proceeds of sale discharged from the obligation of residence." Then, after referring to Byrne J.'s order declaring that the widow had the power of a life tenant under the Settled Land Act, and that she would not forfeit the benefits given her by the will by selling under such power, he adds (3): "In other words, she can sell; and if she sells she will be entitled as against the proceeds of sale to the same annual benefit (which must then be represented by money) as if she had not sold." Later on he says (4): "But if she sells, and therefore ceases to reside, she will, by virtue of s. 51 of the Act of 1882, be entitled as against the income of the proceeds of sale to the same benefits as if she had not sold"; and at the end of his judgment sanctioning the compromise he says (5): "They"—the beneficiaries—"pay something less than before, and to that extent get a benefit. The widow gives up something; but she obtains this benefit—that she is no longer obliged to reside in a certain house. The trustees get this benefit—that they are relieved from the difficulty in which they have been placed from the circumstance that the

(1) 16 Times L. R. 525.
(2) [1902] 1 Ch. 378.
(3) [1902] 1 Ch. 383.
(4) [1902] 1 Ch. 384.
(5) [1902] 1 Ch. 385.

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widow might have continued to reside, and thus have interfered with the building scheme; or she might have sold the house under her statutory powers, and yet retained her interest in the proceeds of sale."

These passages clearly shew that in the opinion of Buckley J. (and apart from Byrne J.'s order which bound the actual parties) the widow on selling would have been merely entitled to an interest in the proceeds of sale, and to nothing further.

In view of these conflicting opinions I think I am entitled to treat the matter as open, and notwithstanding the very able argument on behalf of the widow I am quite satisfied that this case is not affected by s. 51 and that she is not entitled to the 160*l.* a year out of the general estate.

Solicitors: *H. Tyrrell & Son, for J. B. Clarke & Co., Birmingham.*

G. R. A.

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[1903 H. 2035.]

Partition Action—Infant—Request for Sale—Sale for Infant's Benefit—Conversion—Partition Act, 1868 (31 *&* 32 *Vict. c.* 40), *s.* 8—*Partition Act,* 1876 (39 *&* 40 *Vict. c.* 17), *s.* 6—*Leases and Sales of Settled Estates Act,* 1856 (19 *&* 20 *Vict. c.* 120), *ss.* 23, 24, 25—*Settled Estates Act,* 1877 (40 *&* 41 *Vict. c.* 18), *ss.* 34, 35, 36.

An infant's share of the proceeds of sale of real estate, sold by the Court in a partition action, though sold at his request and for his benefit, is not converted.

Foster v. *Foster* (1875) 1 Ch. D. 588, and *In re Barker* (1881) 17 Ch. D. 241, 243, applied.

Dicta of Jessel M.R. in *Wallace* v. *Greenwood* (1880) 16 Ch. D. 362, 365, 366, not followed.

SUMMONS.

This was a summons by the heir-at-law of a deceased infant asking for a declaration that a sum of 252*l.* India 3½ per cent. Stock in Court to the credit of the above partition action "The account of Walter Scott Richardson an infant" and representing his share of the proceeds of sale of freehold land sold in the action ought to be treated as real estate and had descended to his

heir-at-law, and for an order for payment to his administratrix as real representative on that footing.

The action was commenced on June 24, 1903, and asked for partition or sale of certain freehold hereditaments. The infant Walter Scott Richardson by Annie Richardson, his mother and next friend, was one of the plaintiffs.

By an order of July 28, 1903, made upon motion for judgment by counsel for the plaintiffs and upon hearing counsel for the defendants and upon reading the statement of claim, and the plaintiffs who claimed to be interested in a moiety of the hereditaments by their counsel requesting—" such request being made on the part of the infant plaintiff by his next friend "—a sale thereof and a distribution of the proceeds instead of a division of the said hereditaments, the usual inquiry as to the persons interested was directed, and an inquiry whether it would be for the benefit of such of the persons interested in the said hereditaments as were infants that the same should be sold, with the usual consequential directions, following Seton on Judgments, 6th ed. p. 1862, form 15; 7th ed. p. 1792, form 14.

By his certificate dated April 4 and filed April 10, 1905, the Master certified (inter alia) that the legal estate was vested in certain persons in trust for other persons in thirty-six shares, of which the infant plaintiff was entitled to nineteen, and that it would be for the benefit of such of the persons interested in the said hereditaments as were infants that the same should be sold.

On May 5, 1905, on the application of the plaintiffs, it was ordered that the hereditaments should be sold with the approbation of the judge and the proceeds paid into Court to the credit of the action. The property was in due course sold and the proceeds paid into Court, and by the order on further consideration, dated February 22, 1906, nineteen thirty-sixths of the proceeds less certain costs and duties were directed to be carried over to the account of the infant plaintiff, and by an order of July 2, 1906, this share was directed to be invested in India 3½ per cent. Stock.

The infant plaintiff died on September 11, 1912, aged twelve. The applicant was his heir-at-law. The respondent was his administratrix, mother, and next of kin.

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Talbot Crossfield, for the infant's heir-at-law. In the case of a person under disability there is an equity to reconversion under ss. 23 to 25 of the Settled Estates Act, 1856, which are incorporated by s. 8 of the Partition Act, 1868: *Foster* v. *Foster* (1); *In re Barker*. (2) In the case of an infant this equity is unaffected by his request for sale: *In re Norton*. (3)

R. M. Pattisson, for the next of kin. The general rule is that an order for sale properly made converts the land into personalty: *Steed* v. *Preece* (4); *Hyett* v. *Mekin* (5); *Burgess* v. *Booth*. (6) The heir must therefore make out an equity to reconversion. This he founds on ss. 23 to 25 of the Settled Estates Act, 1856. In the case of a person absolutely entitled and sui juris at the date of the order, these sections do not apply, whether he requests a sale or not. This was decided by the first judgment in *Herbert* v. *Herbert*. (7) The absence of a proper request for sale has, however, been treated as material in the case of persons under disability. For instance in *Wallace* v. *Greenwood* (8) the share of a married woman was held unconverted for want of a proper request for sale, but Jessel M.R. said that an order for sale at the request of an infant under s. 6 of the Partition Act, 1876, operated as a conversion into personalty, and that "when you have a request for sale made by a competent person, all the consequences will follow, including conversion." In *Foster* v. *Foster* (1) there was no request by the infant defendant, as the Partition Act, 1876, was not then in force. The sale was made at the request of the plaintiffs who were entitled to two thirds.

[SWINFEN EADY J. The sale was properly made, and yet there was reconversion. Can the request of a next friend make any difference?]

It makes all the difference: *Wallace* v. *Greenwood*. (8) In *Mildmay* v. *Quicke* (9) seven shares belonged to the plaintiff and the remaining share to the defendant, a married woman. The general decree for sale and the subsequent special order for sale

(1) 1 Ch. D. 588.
(2) 17 Ch. D. 241, 243.
(3) [1906] 1 Ch. 101, 106.
(4) (1874) L. R. 18 Eq. 192.
(5) (1884) 25 Ch. D. 735.
(6) [1908] 2 Ch. 648.
(7) [1912] 2 Ch. 268, 274.
(8) 16 Ch. D. 362, 365, 366.
(9) (1877) 6 Ch. D. 553.

of the defendant's share to the plaintiff were both made before June 27, 1876, when the Partition Act, 1876, was passed, so that the defendant could not request a sale. Her share therefore remained real estate. In *In re Barker* (1) the committee of the lunatic did not request a sale. The sale was made at the request of persons entitled to a moiety, so that the lunatic's property was in fact taken from him "compulsorily" within the broad principle stated by James L.J. It therefore remained real estate. If the committee had requested a sale, the element of compulsion would have been absent, and the decision would have been the other way. In *In re Norton* (2) it is not clear whether the request was made by the infant's next friend or merely by counsel, but even assuming there was a proper request, there was no finding that the sale was for his benefit, and the sale was in fact made at the request of the defendants who were entitled to a moiety. The second decision in *Herbert* v. *Herbert* (3) turned on the absence of a proper request by the married woman. It was assumed that such a request would have effected a conversion. Otherwise the whole argument was irrelevant.

Talbot Crossfield in reply. *Steed* v. *Preece* (4) is completely disposed of in *Foster* v. *Foster*. (5) It is true that *Foster* v. *Foster* (5) was decided before the Partition Act, 1876, but s. 3 of the Partition Act, 1868, though recognizing that there might be disabilities, enabled the Court if it thought fit to sell at the request of any of the parties interested, without limiting this request to persons sui juris. (6) The equity to reconversion is given by s. 23 of the Settled Estates Act, 1856. The investments allowed by s. 25 are only temporary. In *Wallace* v. *Greenwood* (7) these sections were entirely lost sight of, and the dicta of Jessel M.R. cannot be relied on. *In re Barker* (1) is directly in point. The infant was not in a position to decide on reconversion, and the status quo ante must therefore be preserved.

(1) 17 Ch. D. 241, 243.
(2) [1900] 1 Ch. 101, 106.
(3) [1912] 2 Ch. 268, 278.
(4) L. R. 18 Eq. 192.
(5) 1 Ch. D. 588.
(6) Orders for sale at the request of infants were made in *France* v. *France* (1871) L. R. 13 Eq. 173, and *Grove* v. *Comyn* (1874) L. R. 18 Eq. 387, the Court thinking that a sale was beneficial to them. See Seton on Judgments, 6th ed. pp. 985, 1024, 1877, 1889; 7th ed. pp. 979, 1791, 1805, 1818.
(7) 16 Ch. D. 362, 365, 366.

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SWINFEN EADY J. (after stating the facts). The infant's administratrix and next of kin contends that where property is properly sold by the Court the order for sale operates as an absolute conversion of that property from the date of the order and even before any sale is effected. No doubt (apart from the provisions of the Partition Act, 1868, s. 8) this is the general rule established by *Steed* v. *Preece* (1), *Hyett* v. *Mekin* (2), and *Burgess* v. *Booth* (3), and applicable for instance to sales in administration actions.

I have, however, to consider the case of a sale in a partition action. In *Foster* v. *Foster* (4), a case decided after the Partition Act, 1868, but before the Partition Act, 1876, Jessel M.R. held that the proceeds of sale of an infant's share of real estate in a partition action must be treated as realty. In that case the land was properly sold under an order duly made, and nevertheless the infant's share of the proceeds was treated as realty. This was because the Partition Act, 1868, s. 8, incorporates ss. 23 to 25 of the Settled Estates Act, 1856, and s. 23 provides that the proceeds of sale shall be applied to the purchase or redemption of the land tax, the discharge or redemption of any incumbrance, the purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid, or the payment to any person becoming absolutely entitled. Where the proceeds of sale are directed to be reinvested in land there is an obligation to reconvert those proceeds and they must be treated as real estate. Accordingly in *Foster* v. *Foster* (4) Jessel M.R., referring to his previous decision in *Steed* v. *Preece* (1), says: "All that I decided in *Steed* v. *Preece* (1) was, that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of conversion must follow, if there be no equity in favour of the heir or any one else for reconversion." He then proceeds to explain why the general rule does not apply to sales under the Partition Act, 1868. He says: "In the present case I think there is such an equity in the provisions of ss. 23 to 25 inclusive of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), which must be read as part of the Partition Act, 1868."

(1) L. R. 18 Eq. 192.
(2) 25 Ch. D. 735.
(3) [1908] 2 Ch. 648.
(4) 1 Ch. D. 588, 590.

Foster v. *Foster* (1) was decided under the Partition Act, 1868, and before the Partition Act, 1876, was passed. Sect. 4 of the Partition Act, 1868, provides that "in a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions." The Act, however, contained no provision expressly enabling such a request to be made by persons under disability. This was remedied by s. 6 of the Partition Act, 1876, which provides that "in an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such disability, but the Court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit." Although therefore before the Partition Act, 1876, the Court had full power to sell an infant's share, there was no express statutory provision enabling him to request a sale. The Partition Act, 1876, supplies this provision, but the Court is not bound to comply with his request unless the sale will be for his benefit. In considering whether a sale would be for the benefit of the infant the Court would have regard to the nature and extent of the property and decide whether a sale or partition was more beneficial. The question whether it should be treated as real or personal estate would not be taken into consideration. Even though a sale is properly requested the purchase-money is still liable to be reinvested in land and the liability to reconversion still remains although the sale is for the infant's benefit. The finding that the sale is for the benefit of the infant only means

(1) 1 Ch. D. 588.

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that a sale would be more beneficial than a partition. It is quite consistent that a sale should be for the infant's benefit and yet that the proceeds should be treated as real estate. It was decided by the first judgment in *Herbert* v. *Herbert* (1) that an order for sale under the Partition Acts converts the share of a person absolutely entitled and sui juris at the date of the order into personalty. It is manifest that a person absolutely entitled and sui juris can reconvert at any time if so minded. That is not the case with an infant.

The broad principle in these cases is stated by James L.J. in *In re Barker* (2), a case relating to the sale of a lunatic's share. He says: "There seems to me to be a broad general principle underlying all these questions, which is this, that where property is taken compulsorily from any person who is not sui juris, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property, which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever. The sole object of the change, as it was in this case, is to enable the property to be disposed of advantageously, and one can conceive a great number of very unjust consequences that would follow if any other rule were to be adopted. Here the lunatic was not capable of making any alteration with regard to his property by reason of this change, and that being so, we come to the consideration of the words of the Act of Parliament with that leading principle, as it seems to me, to guide us. Here the 8th section of the Partition Act says in so many words that in any sale effected under the authority of that Act, the Court is to deal with the money in exactly the same way as it would be dealt with under the Settled Estates Act—that is to say, we must read the Act of Parliament as if all the 23rd to the 25th clauses of the Settled Estates Act were repeated totidem verbis in the Partition Act. That being so, we find that the words are, that the money is to be laid out in the purchase of hereditaments, to be settled in the same manner as the hereditaments in respect of

(1) [1912] 2 Ch. 268, 274. (2) 17 Ch. D. 241, 243.

which it was paid: and that means it is to be limited to the same uses, which is in fact a reconversion, unless the matter is governed by the other words, 'or to a person becoming absolutely entitled.' That seems to me, according to the construction put upon it under the Lands Clauses Act, to mean a person becoming subsequently absolutely entitled to the money. I am, therefore, of opinion in this case that the money ought to be dealt with as real estate."

The explanation of the observations of Sir George Jessel in *Wallace* v. *Greenwood* (1) probably is that he had not present to his mind the provisions of s. 23 of the Settled Estates Act, 1856, providing for a reinvestment in land. His own previous decision in *Foster* v. *Foster* (2) shews that where the share of an infant in real estate is properly sold by order of the Court, it may nevertheless remain real estate. In my opinion, the mere fact that an infant, acting by a next friend under the Partition Act, 1876, requests a sale, is not sufficient to effect a conversion, when if a sale is made of an infant's land under the Partition Act, 1868, there is no conversion. It cannot have been intended that if the infant's land is sold by reason of other persons requesting a sale, there shall not be a conversion, but if the next friend requests a sale there shall be a conversion. There is nothing in the Partition Acts to warrant this distinction. In both cases the sale is or may be made on the same footing, namely, that a sale is more beneficial than a partition, and in each case the proceeds remain under the Partition Act liable to be reinvested in land.

In my opinion the fund in Court is still subject to be laid out in the purchase of other hereditaments under the Settled Estates Act, 1856, s. 23, and was not converted into personal estate by the order for sale.

Solicitors: *Crossfield, Cushing & Wheldon.*

(1) 16 Ch. D. 362, 365, 366. (2) 1 Ch. D. 588.

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Jan. 30.

SHAW *v.* TATI CONCESSIONS, LIMITED.

[1913 S. 219.]

Company—Meeting—Poll—Adjournment ad hoc—Proxies to be lodged forty-eight hours before Meeting "or Adjourned Meeting"—Poll fixed for Future Date—No Adjournment of Meeting—Validity of Proxies lodged forty-eight Hours before Poll.

A poll demanded at a company meeting was directed to be taken at a future date, but the meeting itself was not adjourned :—

Held, that the mere postponement of the poll was not an adjournment ad hoc of the meeting within the meaning of an article allowing the lodgment of proxies forty-eight hours before a meeting "or adjourned meeting," but the original meeting continued for the purpose of the poll, and no fresh proxies could be lodged.

Reg. v. *Wimbledon Local Board* (1882) 8 Q. B. D. 459, 462, 464, 465, followed.

Motion.

This was a motion by the plaintiff on behalf of himself and all other shareholders of the defendant company other than the five defendant directors to restrain the company and those five directors from using at a poll to be held on January 31, 1913, any proxy not lodged at the company's office for at least forty-eight hours before the time fixed for holding the eighteenth ordinary general meeting held on December 20, 1912.

The company was incorporated on March 14, 1895, with a capital of 500,000*l.* divided into 500,000 1*l.* shares, of which 394,125 had been issued and were fully paid. The present directors held 14,155 shares.

The articles provided as follows :—

Article 59 provided for the holding of the first general meeting.

Article 60 provided that subsequent general meetings should be held once at least in 1896 and in every subsequent year at such time and place as might be prescribed by the directors.

Article 61 provided that the above-mentioned general meetings should be called ordinary meetings.

Article 65 provided for seven clear days' notice of a meeting.

Article 67. "The business of an ordinary meeting, other than the first one, shall be to receive and consider the profit and loss

account and the balance-sheet; the reports of the directors and of the auditors; to elect directors and other officers in the place of those retiring by rotation, to declare dividends, and to transact any other business which, under these presents, ought to be transacted at an ordinary meeting."

Article 68 provided that all other business should be deemed special.

Articles 72 and 73 provided that questions were to be decided on a show of hands unless a poll was demanded.

Article 74. "If a poll is demanded as aforesaid it shall be taken in such manner, and at such time and place as the chairman of the meeting directs, and either at once or after an interval, or adjournment, or otherwise, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded."

Article 75. "The chairman of a general meeting may with the consent of the meeting adjourn the same from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place."

Article 76. "The demand of a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded."

Article 77. "Any poll duly demanded on the election of a chairman of a meeting, or on any question of adjournment, shall be taken at the meeting without adjournment."

Article 78. "On a show of hands every member present in person shall have one vote, but at a poll every member present in person or by proxy shall have one vote for every share held by him."

Article 82. "The instrument appointing a proxy and the power of attorney (if any) under which it is signed shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting or adjourned meeting (as the case may be) at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution."

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Article 85. "Every instrument of proxy, whether for a specified meeting or otherwise shall, as nearly as circumstances will admit, be in the form or to the effect following:—

"THE TATI CONCESSIONS, LIMITED.

"I of in the county of being a member of the Tati Concessions, Limited, hereby appoint of or failing him of or failing him of as my proxy to vote for me and on my behalf at the (ordinary or extraordinary, as the case may be) general meeting of the company to be held on the day of and at any adjournment thereof.

"As witness my hand this day of "

On December 11, 1912, the board gave notice that the eighteenth ordinary general meeting would be held at Cannon Street Hotel on December 20 at 11 A.M. "to receive and consider the annual statement of accounts and balance-sheet, and the report of the directors; to elect directors in the place of those retiring by rotation; and to transact the other ordinary business of the company." The annexed report stated that it was hoped that Mr. Temby, the director in charge of the company's property, would have been able to return before the end of the year. "The meeting is now called to comply with the provisions of the Companies Acts, but except for the purpose of passing the accounts and the election of directors and auditors, it will stand adjourned until a date to be announced later when Mr. Temby will attend and personally report to the shareholders."

The board, apprehending no opposition to the proposed resolutions, had not obtained or lodged any proxies, but 48¼ hours before the meeting the plaintiff and Frederick Walker lodged proxies representing 58,000 shares, and when the resolution to adopt the accounts was moved, Walker moved an amendment that the accounts be received and not adopted. The amendment being thrown out by twelve votes against nine, he demanded a poll, which the chairman directed to be taken between 11 A.M. and 1 P.M. on January 31, 1913, at the same place. Three other polls were demanded and fixed for the same time and place, and after a vote of thanks to the chairman the meeting was brought to a close.

On December 23, 1912, the board issued a circular with a reprint of the *Mining World* to the shareholders. The circular was as follows:—"Herewith you will find a reprint from the *Mining World* of the meeting of this company held on 20th inst., from which you will see that a poll will be taken at an adjourned meeting to be held on January 31 at Cannon Street Hotel, at 11 A.M. Notice of the adjourned meeting will be given at a later date, and under the circumstances the only business which will be done at that meeting will be the taking of the poll. The board will in due course send you a further communication both as to the poll and the issues involved therein, and they invite the shareholders not to give their proxies to any one until such communication has reached them."

The statement that the meeting was adjourned was at once challenged by Walker in a letter to the board dated December 24, 1912. He threatened proceedings in the event of any attempt to hold an adjourned meeting, pointing out that the adjournment of a poll did not constitute the adjournment of the meeting (see article 76) and that the chairman had no power to adjourn the meeting under article 75 without the consent of the meeting, which was not asked or obtained. He added, "When I announced that I should resist any adjournment of the meeting, the chairman expressly abandoned his proposal to adjourn it."

The board did not take this view, and on January 21, 1913, they gave formal notice that a meeting would be held on January 31 for the purpose of taking a poll on the four issues. On the same date five out of the six directors issued a circular asking for proxies and enclosing a form of proxy, in response to which they received proxies representing 99,245 shares. Walker did not ask for further proxies, but proxies representing 400 shares were sent to him gratuitously, which he considered out of time and invalid.

On January 23, 1913, the plaintiff issued a writ and served the above notice of motion against the company and the five directors who had obtained proxies.

In his affidavit the chairman said, "Towards the end of the meeting the question of the adjournment suggested in the directors' report came up for consideration and upon the said

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Frederick Walker saying that he would oppose any adjournment of the meeting as suggested in the directors' report I said that the matter would not be pressed as the subjects intended to be discussed at the proposed adjourned meeting had already been discussed and as a poll had been demanded and was going to be held I saw no object in adjourning the meeting for Mr. Temby to address it. The meeting was therefore adjourned for the purpose of taking the poll and for no other purpose."

On the other hand the plaintiff and Walker deposed that the meeting was not adjourned at all, but that the chairman expressly abandoned the idea and did not attempt to get the leave of the meeting to any adjournment. Had he attempted to do so they and their supporters could have defeated the attempt, because under article 77 the chairman could not postpone a poll on the question of an adjournment. This evidence was borne out by other members present.

Hon. Frank Russell, K.C., and *H. E. Wright*, for the plaintiff. There was clearly no adjournment of the meeting within article 82. We could have prevented an adjournment under article 77 if the idea had not been expressly abandoned. The poll is merely an enlargement of the original meeting: *Reg.* v. *Wimbledon Local Board.* (1) It is in no sense an adjournment, and the fresh proxies are consequently invalid.

Gore-Browne, K.C., and *Sheldon*, for the defendants. The fixing of the poll at a subsequent date purported to be and was in law an adjournment ad hoc within article 82 read by the light of articles 74 to 77. The only object of the forty-eight hours limit is to give the board time to examine the proxies. The subsequent proxies are therefore valid: Palmer's Company Precedents, 11th ed. pt. i. p. 706; *In re Caratal (New) Mines, Ld.* (2)

SWINFEN EADY J., after stating the facts and pointing out that it was manifest from the chairman's affidavit that he had abandoned the original idea of adjournment, and that his statement that the meeting was "adjourned for the purpose of taking

(1) 8 Q. B. D. 459, 462, 464, 465. (2) [1902] 2 Ch. 498, 501.

the poll and for no other purpose" did not mean that there was any resolution for adjournment, but merely expressed his view that in law the poll was an adjourned meeting, and that it was clear there had been no actual adjournment, continued: The defendants contend that the appointment of a future date—January 31, 1913—for taking the poll constituted an adjournment ad hoc of the meeting to that date within article 82, which requires proxies to be lodged not less than forty-eight hours before the time for holding the meeting "or adjourned meeting," and that therefore the directors had further time for obtaining and lodging proxies. In my opinion proxies to be in order and valid within article 82 must be lodged forty-eight hours before the time for holding the original meeting, unless that meeting is duly adjourned. If there is an adjourned meeting they may be deposited later, namely, forty-eight hours before the adjourned meeting. But here there was no adjourned meeting, and the taking of a poll is not a meeting.

The true legal position is this. There is no adjourned meeting, but the original meeting continues for the purpose of taking the poll until the poll is closed. Therefore proxies obtained and lodged later than forty-eight hours before the original meeting are not available.

The motion succeeds, and the costs will be the plaintiff's costs in the action.

Solicitors: *Frederick Walker & Co.; Flux, Leadbitter & Neighbour.*

G. R. A.

EVE J.
1913
Feb. 6.

In re LAYE.
TURNBULL *v.* LAYE.

[1912 L. 990.]

Forfeiture—Will—Construction—Determinable Life Interest—Till Tenant for Life "have his affairs liquidated by arrangement or composition"—Or his Income or Part thereof "become payable to some other person"—Receiving Order—Discharge of Order—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126—*Bankruptcy Rules*, 1886, *r.* 208.

Where a life interest in a trust fund is to determine on the happening of any event whereby the income or any part thereof would, if belonging absolutely to the tenant for life, become "payable to some other person," the life interest determines if a receiving order is made against the tenant for life and any income comes to the hands of the trustees before it is discharged.

Whether the same result will follow if no income comes to hand while the receiving order is in force, *quære.*

In re Sartoris' Estate [1892] 1 Ch. 11, explained and followed.

A testator, who made his will and died in 1883, directed trustees to pay the income of a trust fund to a son until he should die or "have his affairs liquidated by arrangement or composition," or do or suffer something whereby the income or part thereof would if belonging absolutely to him "become payable to some other person." In December, 1910, a receiving order was made against the son. In February, 1911, the creditors having accepted a scheme for payment by instalments of their debts in full with provision for a composition of 7*s.* 6*d.* in the event of the debtor's death, the Court discharged the order. Upon a summons to determine whether the debtor had forfeited his life interest:—

Held, that the debtor was not by the scheme "having his affiairs liquidated by arrangement or composition," those words contemplating liquidation by arrangement or composition as recognized by the Bankruptcy Act, 1869; but that, assuming that while the receiving order was in force moneys payable to the debtor came to the trustees' hands, the receiving order operated to make those moneys "payable to some other person," and a forfeiture of the life interest had taken place.

ADJOURNED SUMMONS.

By his will dated January 29, 1883, Henry Thomas Laye directed his trustees from and after the death of his wife to stand possessed of the trust moneys representing his residuary estate upon trust "to pay the annual income thereof unto my son Arthur Henry Webb Laye until he shall die or be outlawed or

become a bankrupt or have his affairs liquidated by arrangement or composition or shall assign charge or incumber or attempt or affect to assign charge or incumber the same income or some part thereof or shall do or suffer something whereby the same or some part thereof would through his act or default or by operation or process of law or otherwise if belonging absolutely to him become vested (*sic*) or payable to some other person or persons" and after the failure or determination of the trust in favour of his son in the son's lifetime upon further trust as therein mentioned.

The testator died on September 28, 1883, and his will was duly proved.

The testator's widow died on February 10, 1897, and on October 23, 1909, the son committed an act of bankruptcy in respect of which a receiving order was made against him on December 9, 1910. By an order of the Court having seisin of the bankruptcy proceedings dated February 24, 1911, the Court, being satisfied that the creditors had duly accepted a scheme of arrangement for payment of all debts in full and that the terms were reasonable and calculated to benefit the general body of creditors and provided reasonable security for payment of 7*s.* 6*d.* in the pound in the event of the debtor's death, approved the scheme and ordered that "the receiving order be and the same is hereby discharged."

The trustees of the will issued this summons for the determination of the question (inter alia) whether on the true construction of the will the receiving order, or the scheme of arrangement approved by the order discharging the receiving order, operated as a forfeiture of the life interest of A. H. W. Laye in the testator's residuary estate.

The trustees alleged that at the date of the receiving order they had overpaid the tenant for life, but by January 3, 1911, had further income in hand ready for payment, and that between that date and the discharge of the receiving order they had paid the tenant for life considerable sums.

Clayton, K.C., and *Wilfrid Hunt*, for the plaintiffs. But for the forfeiture clause the tenant for life's income would under the

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receiving order have been received by the official receiver, who would have given credit for it in his costs, charges and expenses. There has therefore been a forfeiture of his life interest, as he has "suffered something whereby" his income "or some part would" have "if belonging absolutely to him become payable to some other person," here the official receiver: *In re Sartoris' Estate.* (1) The discharge of a receiving order does not undo what has been done under it. Moreover the case comes within the words "have his affairs liquidated by arrangement or composition," the scheme which was accepted being a liquidation by arrangement, in substance and effect the same as what was first enabled to be done by the Bankruptcy Act, 1869, which applies here.

R. Sillem (*R. J. A. Morrison* with him), for infant children of the tenant for life.

P. O. Lawrence, K.C., and *T. L. Wilkinson*, for the tenant for life. The case is clearly not within the words "have his affairs liquidated by arrangement or composition." It is true the tenant for life has entered into a scheme, but there has been no liquidation by anybody and it cannot be said that anything of the sort has taken place.

As to whether the income or some part of it would, if belonging to him absolutely, have "become payable to some other person," *In re Sartoris' Estate* (1) was a very different case from this. Here, as soon as the receiving order was made, every effort was made to get rid of it to avoid forfeiture, and the receiving order was discharged. There is for this purpose no difference between "discharging" and "rescinding" a receiving order. It depends upon the facts of each case whether a receiving order which has been discharged or rescinded can be treated as if it had never been made. This is a case in which it can be so treated. Everything was wiped out when the rescinding order was made. In *In re Sartoris' Estate* (1) the receiving order was subsisting. *White* v. *Chitty* (2), where the forfeiture clause was practically identical with the clause here, covers this case. There has, therefore, been no forfeiture.

There is further a wide distinction between this case and *In*

(1) [1892] 1 Ch. 11. (2) (1866) L. R. 1 Eq. 372.

re Sartoris' Estate (1) in the fact that here the official receiver could not, it is submitted, have made any effectual claim upon the trustees for money. It was merely by arrangement that the tenant for life received income when he did, monthly. An inquiry might shew that during the few weeks' interval between December 9, 1910, and February 24, 1911, there was no income the payment of which could in law have been compelled.

Moreover, in this case the receiving order was not only discharged, but discharged on terms of the tenant for life paying his creditors in full.

(No reply was called for.)

EVE J. The question I have to decide is whether the events that have happened have worked a forfeiture of the protected life interest of Arthur Henry Webb Laye under the will of his father, Henry Thomas Laye. In view of one of the contentions raised by the plaintiffs, it is not unimportant to note that the will is dated January 29, 1883, that the testator died on September 28, 1883, and that at both dates the Bankruptcy Act in operation was the Act of 1869. [His Lordship stated the facts, and continued:] I have therefore to ask myself, Do these events result in a forfeiture of the life estate? The trustees submit that they do.

In the first place they contend that the tenant for life, who under the scheme contemplated, if he lived, the payment in full of his debts by annual instalments and, if he died, the payment of a composition of 7*s.* 6*d.* in the pound by means of a policy, is in effect "having his affairs liquidated by arrangement or composition" within the meaning of the clause in the will. I do not assent to that contention. I think that, when the testator used the words "until he shall have his affairs liquidated by arrangement or composition," he was referring to liquidation by arrangement or composition as then recognized by, and frequently adopted under, the then existing bankruptcy law, and that the expression cannot accurately be applied to a scheme of the nature here approved by the Court.

But, apart from this, the trustees further contend that the

(1) [1892] 1 Ch. 11.

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making of the receiving order was the happening of an event whereby the income or some part thereof would, if it had belonged absolutely to the tenant for life, have become payable to some other person, and, this being so, they argue that the life interest has been determined. In considering this contention I am proceeding upon the assumption that the trustees are right in saying that during the time when the receiving order was in force moneys came into their hands which but for the order would have been payable to the debtor. In that state of things can it be denied that the receiving order operated to make these moneys "payable to some other person"? I do not think it can. The proposition seems to be established by the judgment in *In re Sartoris' Estate.* (1)

But it is argued by counsel on behalf of the tenant for life that the facts in *In re Sartoris' Estate* (1) were peculiar and differ from the facts in this case in three important respects—that in *In re Sartoris' Estate* (1) the receiving order was still subsisting, here it has been discharged; that there the official receiver had intervened and in fact received part of the income, here he never made any claim to be paid anything; and finally that, whereas in the former case an adjudication might or might not follow, here no such event is possible, the receiving order having been discharged. It is quite true that the facts of this case are dissimilar to the facts of that case in all these respects, but I do not think the decision of Chitty J. rests merely upon the particular facts with which he was there dealing. On the contrary, I think his judgment establishes this much at any rate as a general proposition, that in all cases in which the life interest is to determine on the happening of any event, whereby the income or any part of it would, if belonging absolutely to the tenant for life, be payable to some other person, such determination is brought about wherever a receiving order is made and income comes to the hands of the trustees before it is discharged. He did not decide, and it is not necessary for me to decide to-day, whether the same result would follow if no income came to hand while the receiving order was operative. I think therefore I should be disregarding the principles upon which *In re Sartoris'*

(1) [1892] 1 Ch. 11.

Estate (1) was decided if I were not to hold that there has been a forfeiture of the life interest in this case, and I must make an order declaring that the life interest has been forfeited.

[The declaration was made on the assumption that there was at some time between December 9, 1910, and February 24, 1911, some income in the hands of the trustees payable to the tenant for life. But an inquiry was directed, in case of his desiring it, whether there was any income which would have become payable to him between those dates if the receiving order had not been made.]

Solicitors: *Jaques & Co., for Turnbull & Sons, Scarborough; Long & Gardiner, for F. H. Anderson, York.*

A. L.

In re MARKE WOOD, SENIOR. *In re* MARKE WOOD, JUNIOR. WODEHOUSE *v.* WOOD.

[1912 W. 1643.]

Settlement by Will—Construction—Hotchpot Clause—Several Settled Funds—Trusts by Reference.

A testator gave three separate funds to trustees upon trusts, fully set out in each case, for his three children respectively for life, with remainder to their issue as they should respectively appoint, and n default of appointment to their respective children in equal shares with a hotchpot clause. In each case the testator gave the fund over, on failure of the express trusts, upon trusts in favour of his other children and their issue successively, by reference to the trusts expressly declared in favour of such children and their issue concerning the fund given in trust for them in the first instance.

In the events which happened, a granddaughter of the testator became entitled to one fund by appointment, and to a share in another fund in default of appointment:—

Held, that she was entitled to take her share in the unappointed fund without bringing into hotchpot the appointed fund.

Held, also, that there is no general rule of construction that when a testator settles a fund on certain trusts with a hotchpot clause, and by

(1) [1892] 1 Ch. 11.

NEVILLE J.

1913

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the same will settles a second fund by reference to the trusts of the first, he intends to make one fund with a hotchpot clause extending over the whole. In every such case it is a question of construction upon the whole will.

In this respect there is no difference between the construction to be applied to words used in a will and words used in a deed.

In re Marquis of Bristol [1897] 1 Ch. 946, and *In re Cavendish* [1912] 1 Ch. 794, followed.

In re Perkins (1893) 67 L. T. 743, discussed.

JAMES MARKE WOOD by his will, after appointing executors and trustees, gave the sum of 45,000*l.* to his trustees upon trust to invest the same as therein mentioned, and out of the income thereof to pay to his son William Palgrave Wood until he should attain the age of twenty-five years the yearly sum of 700*l.*, and to accumulate the residue of such income at compound interest, and so soon as his said son should attain the age of twenty-five years to raise out of the trust funds and the accumulations thereof and pay to him the sum of 20,000*l.*, and to stand possessed of the residue of the said sum of 45,000*l.* and the accumulations thereof "Upon the trusts following that is to say In trust to pay the dividends interest and income thereof to my said son and his assigns during his life with power to him by deed or will to appoint that after his decease the whole or any part of such dividends interest and income shall be paid to any wife of his who may survive him during her life or for any less period and from and after his decease and subject to any appointment which may be made to his wife as aforesaid in trust for all or such one or more exclusively of the other or others of the children and remoter issue of my said son (such remoter issue being born in his lifetime) at such ages or times age or time in such shares if more than one and in such manner as my said son by any deed or deeds with or without power of revocation and new appointment or by his will or any codicil thereto shall appoint and in default of such appointment and so far as any such appointment shall not extend in trust for the children of my said son who being sons shall attain the age of twenty-one years or being daughters shall attain that age or marry in equal shares and if there shall be only one such child the whole to be in trust for that one child But so nevertheless that no child

who or whose issue shall take a share under any such appointment as aforesaid shall (in default of appointment to the contrary) take any part of the trust funds remaining unappointed without bringing the share appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly." Subject to the trusts aforesaid the testator directed his trustees to stand possessed of the residue of the trust fund to arise from the investment of the said legacy or sum of 45,000*l.* and the accumulations of income thereof after payment of the said sum of 20,000*l.* "Upon the like trusts for the benefit of my daughter Katherine Elizabeth Wood and her husband and issue as are hereinafter declared concerning the trust fund to arise from the legacy or sum of 30,000*l.* hereinafter bequeathed in trust for my said daughter her husband and issue and subject thereto Upon the like trusts for the benefit of my said son James Marke Wood and his wife and issue as are hereinafter declared of and concerning the share of my said son James Marke Wood of and in my residuary personal estate And subject to the several trusts aforesaid in trust for the said William Palgrave Wood his executors administrators and assigns absolutely."

The testator then bequeathed the sum of 30,000*l.* to the same trustees upon trust to invest as therein mentioned and out of the dividends and income thereof to maintain and educate his daughter Katherine Elizabeth Wood until she should attain the age of twenty-one or marry under that age with the consent of her mother or his trustees, and to accumulate the residue of such income, and if she should attain that age or marry with such consent to pay the income of the trust fund arising from the investment of the said sum of 30,000*l.* and the accumulations of income thereof to his said daughter during her life for her separate use without power of anticipation, and after her decease upon trusts set out in full in favour of his said daughter's husband, children, and issue precisely similar to those previously declared in favour of his son W. P. Wood and his wife, children, and issue, of the said residue of the sum of 45,000*l.*, with the same hotchpot clause. Subject to the trusts declared in favour of his daughter and her issue the testator directed his trustees to hold the 30,000*l.* upon trusts in favour of his son

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W. P. Wood and his wife and issue, and subject thereto upon trusts in favour of his son J. M. Wood and his wife and issue declared by reference to the gifts in their favour respectively of the residue of the sum of 45,000*l.* and of two thirds of his general residue respectively, thereinbefore and thereinafter mentioned, in the same words as the trusts declared by reference to the residue of 45,000*l.*, with an ultimate remainder in trust as his said daughter should by deed or will appoint, and in default of appointment if she should die unmarried for her absolutely, and if she should marry, in trust for such persons as would have been entitled thereto if she had died possessed thereof intestate and without having been married.

The testator gave his residuary estate after payment of debts, &c., to the same trustees, as to two thirds thereof upon trusts, fully set out, in favour of his son J. M. Wood and his wife and issue in all respects similar to the trusts thereinbefore declared in favour of his son W. P. Wood and his wife and issue of the said residue of the sum of 45,000*l.* with the same powers of appointment and the same hotchpot clause. And subject thereto the testator directed his trustees to hold one moiety of the two thirds upon trusts in favour of the said W. P. Wood and his wife and issue, and subject thereto upon trusts in favour of his said daughter and her issue declared by reference to the gifts in their favour thereinbefore fully set out as aforesaid, and as to the remaining moiety of the said two thirds upon trusts declared by reference as aforesaid in favour first of his daughter and her husband and issue, with remainder in favour of his son W. P. Wood and his wife and issue, with an ultimate remainder as to the whole two thirds in trust for his son J. M. Wood absolutely.

And the testator directed that the remaining third part of his residuary estate should be held upon trusts in favour of his son W. P. Wood and his wife and issue, with remainder as to one moiety thereof upon trusts in favour first of his said son J. M. Wood and his wife and issue, and subject thereto upon trusts in favour of his daughter and her husband and issue declared by reference in manner aforesaid to the trusts thereinbefore fully set out concerning the residue of the sum of 45,000*l.*

and the sum of 30,000*l.* respectively, and as to the other moiety upon trusts in favour of first his daughter, her husband and issue, and subject thereto upon trusts in favour of his son J. M. Wood and his wife and issue declared by reference in manner aforesaid to the trusts thereinbefore declared of the legacy of 30,000*l.* and the two thirds of residue respectively, with an ultimate remainder as to the whole of the said one third part in trust for his son W. P. Wood absolutely.

The testator died on March 1, 1879, and his will was duly proved on March 28.

The three children mentioned in his will all survived him, having attained twenty-one in his lifetime.

James Marke Wood, the testator's son, died on December 27, 1908, having by his will appointed the two thirds of his father's residuary estate over which he had a power of appointment to his daughter Esther Rosamond, the wife of the Conte di Sant Elia. He had one other child, James Marke Wood, the grandson, who attained twenty-one, and died in 1903, in his father's lifetime, intestate, without having had any issue; his widow had married again and was now Mrs. Shewan.

There was a settlement executed on the marriage of the Contessa di Sant Elia, containing a covenant to settle after-acquired property, which her counsel admitted included the share she took under the will of James Marke Wood the elder.

The testator's son William Palgrave Wood died on February 9, 1911, intestate and without having ad any issue.

This originating summons as taken out by Katherine Elizabeth Wodehouse, the legal personal representative of the last surviving trustee of the will of James Marke Wood the elder, for the decision, among others, of the question whether upon the true construction of the wills of J. M. Wood the elder and J. M. Wood the younger the Contessa was entitled to one half share of the unappointed moiety of the one third share of the residue without bringing into hotchpot the two third shares appointed to her by her father's will.

The defendants were the executors of J. Marke Wood, junior, the trustees of the marriage settlement of the Contessa, the widow

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C. G. Church, for the summons.

Upjohn, K.C., and *T. J. C. Tomlin*, for the trustees of the Contessa's settlement. The trusts of the moiety of the one third share of residue given in favour of J. M. Wood and his wife and issue on the failure of the trusts in favour of W. P. Wood and his issue are declared by reference to the trusts of the two thirds. That means that you must repeat the words of the trusts referred to and apply them to the second trust. If this is done the hotchpot clause is confined to the particular fund, it operates only upon the trust funds remaining unappointed, and therefore can only include funds over which the power of appointment referred to extended. In *In re Perkins* (1) North J. held that the hotchpot clause extended over two funds when the trusts of one were declared by reference to those of the other; but he was not laying down any rule of construction. He found in the will before him an intention to make the separate funds one. The decisions of Romer J. in *In re Marquis of Bristol* (2) and of Parker J. in *In re Cavendish* (3) shew that the general rule is that each hotchpot clause is confined to the special fund referred to, unless the whole document shews an intention to make the funds into one fund.

Peterson, K.C., and *Sargant*, for the Conte and Contessa di Sant Elia.

Jenkins, K.C., and *A. àB. Terrell*, for Mrs. Shewan, the administratrix of J. M. Wood the grandson. The argument on behalf of the Contessa is merely an attempt to fritter away the rule laid down by North J. in *In re Perkins.* (1) He was clearly laying down a rule of construction, and the case is treated as so doing by Romer J. and Parker J. in the cases cited by the Contessa's counsel. They both distinguished the cases before them on the ground that they concerned settlements by deeds, and not wills, and that in a deed the trust declared of

(1) 67 L. T. 743. Also reported [1893] 1 Ch. 283, but only on a different point.

(2) [1897] 1 Ch. 946.

(3) [1912] 1 Ch. 794.

the first fund cannot be altered by the trust declared of the later fund by reference.

In Theobald on Wills, 7th ed. p. 776, the general rule is stated to be that where several funds are settled by the same instrument, and there is a hotchpot clause, an appointee of one fund cannot claim an unappointed share in another fund without bringing the fund appointed to him into hotchpot, unless there is a clear indication that the funds are to be treated as separate, and the author treats *In re Perkins* (1) as establishing that, where a fund is settled by a will with a hotchpot clause and other funds are settled by the same will upon the same trusts by reference, there is to be prima facie one hotchpot clause applicable to all the funds, and not a separate hotchpot clause applicable to each. The question is whether the testator has expressed any intention to make separate funds with separate hotchpot clauses, or one fund with a hotchpot clause applying to the whole.

In this case there are very strong indications that the testator intended to make one fund of the share originally given to each child and the accruing shares given to him on failure of the other shares. The testator divides his property between his three children in unequal shares. In every case he declares the trusts of the child's original share in full, and the shares which are given over to that child on failure of the trusts of the other shares are given by reference to the trusts of his original share. It is a much stronger case for making one hotchpot clause than where a fund is settled on one child by reference to the trusts in favour of another. In this case the power of appointment would always be in the same person; in *In re Marquis of Bristol* (2) it was in different persons.

In *Trew* v. *Perpetual Trustee Co.* (3) Lord Hobhouse, delivering the judgment of the Privy Council, shews that the rule of rewriting the words of the trust referred to must not be too strictly relied on.

In *Montague* v. *Montague* (4), where the hotchpot clauses were held to be separate, there were two distinct settlements, each with its own hotchpot clause.

(1) 67 L. T. 743.
(2) [1897] 1 Ch. 946.
(3) [1895] A. C. 264, 267.
(4) (1852) 15 Beav. 565.

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Dighton Pollock, for Agnes Wood, one of the executors of J. M. Wood the son.

NEVILLE J. The point which arises for decision in this case involves the necessity, in the first instance, of ascertaining whether there is any rule of construction which ought to be applied in dealing with the will in question.

I have been referred to two passages in the 7th edition of Mr. Theobald's work upon Wills, on p. 776, which both have reference to the cases which have been cited before me. I do not know whether it was intended by the learned author to indicate that there is some principle or rule of construction to be applied in construing such a question as that which arises in the present case. If that be the intention in my opinion the cases there cited do not support such a proposition. I have examined carefully the words used and I think that they quite accurately declare the effect of the particular decisions that are referred to. I think in each case the decision is in accordance with what the author has stated, but in each case cited it appears to me that care has been exercised to indicate that the construction depended upon the words used in the particular will and not upon any rule of construction. It is quite true that Romer J. in the case that was before him—*In re Marquis of Bristol* (1)—embarks upon a proposition which might have been of importance had it not been deprived of its force, for the present purpose, by the words which follow, in which the learned judge indicates that the proposition which he approves must be limited to the question of multiplying charges upon trust funds. With the greatest possible deference to the learned judge, I doubt very much whether the decision of the Privy Council, to which he appears to refer with regard to that proposition, is not just as carefully guarded as the other decisions to which I have been referred from indicating any intention to lay down a general rule of construction; indeed the words which appear to be relied upon are the words of Lord Hobhouse negativing the existence of a rule of construction which had apparently been contended for in argument. I think in each of the cases the decision has turned upon the

(1) [1897] 1 Ch. 946.

meaning of the words used and has depended upon no other principle than this, that you must take the will as a whole and ascertain to the best of your ability what the expressed intention of the testator was. I think the view I take is supported by the decision of Parker J. in *In re Cavendish* (1), because at the outset of his judgment he says that that is the duty cast upon him—that in the absence of an express provision in the deed, which he had before him, the question is left open to be determined on the construction of the document as on a will. For my part I see no distinction whatever to be drawn in the construction to be applied in this respect to the words used in a deed and the words used in a will.

That being so, I have to consider what is the intention expressed by the testator in the present case. I would point out here that in the absence of some words expressing a particular intention it must be pure guesswork when two funds are dealt with, with separate powers of appointment and separate hotchpot clauses, to say that the testator intended that the hotchpot clauses should be amalgamated and no child should take a share in either of the funds without bringing into hotchpot any shares which might have been appointed under either. In my opinion, in the absence of anything to indicate an intention to the contrary, the referential declaration of trusts, in terms the same as, or similar to, the terms used here, do in effect mean no other than this: you are to reiterate the trusts already declared with reference to another fund in another part of the instrument, making only those necessary alterations as to names which would make the trusts applicable to the gift which is under consideration. It appears to me in the present case the words demand that that should be done, and if you do that, then you have an original gift of two thirds subject to powers of appointment and a gift over in default of appointment with a direction that no child should take his share without bringing his appointed share into hotchpot, and you get that equally with regard to the referential trusts relating to the one third. I am very much impressed by the view taken by both Romer J. and Parker J. in the cases cited, namely, that if you amalgamate the

(1) [1912] 1 Ch. 794.

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two hotchpot clauses you do alter the trusts of the first fund which were declared without reference to anything else, and you alter them because another fund has been settled by reference to the settlement of the first fund. Unless there is something to indicate an intention on the part of the testator that that should be done, it seems to me a very strong thing to do and a thing no more justifiable in the case of a will than it is in the case of a deed. The trusts of the original two thirds are to the effect that the children shall take in equal shares so far as the fund is unappointed subject to this, that a child who has an appointed share must bring his appointed share into hotchpot before he shares in the unappointed fund, and if you are going to say you must bring into hotchpot not only what is appointed under the fund, but what is appointed under another fund to which the first trusts do not refer at all, you do effectually alter the trusts originally declared. In the absence of some justification for that indicated by the testator in words used in other parts of the will I do not think that it is a legitimate construction.

The case to which I have been referred, *In re Perkins* (1), is in a sense a very strong decision, because there three separate parts of an estate were settled in precisely the same manner upon three different sets of beneficiaries, and one cannot see, at a first glance at all events, what motive there could be for the separation of the parts of the estate, the destination being similar in each case, except to keep them asunder and not to have them treated as all forming part of one fund; but in that case North J. found sufficient in other parts of the will, notwithstanding that prima facie difficulty, to lead him to the conclusion that what the testator really meant was that those funds should be treated as one fund and there should be one hotchpot clause making it necessary for an appointee of any one property to bring that into hotchpot before taking under the fund in default of appointment. I do not say that is not a perfectly sound conclusion on the words of that will. You cannot read the judgment of North J. without seeing that what he is doing there is not attempting to lay down a principle, or to give effect to any fancied rule of construction,

(1) 67 L. T. 743.

but to ascertain, by comparing the various parts of the will, what it was the testator really meant.

I think in this case I am bound to come to a conclusion, irrespective of authority, as to the meaning of this particular will. It has been suggested if there is no rule of construction it is time to lay one down, and that a rule such as is suggested in the text-books should be now given effect to by decision of the Court. I can only say that so far as my experience goes the rules of construction which already exist quite as often defeat the testator's intention as give effect to it, and I should be the last person in the world to wish to add a new rule to the now somewhat abbreviated category of such rules; but further than that it is quite obvious, I think, from the decisions to which I have already referred, that I could do nothing of the kind, without flying in the face of the decision of Parker J. in *In re Cavendish* (1) and the decision of Romer J. in *In re Marquis of Bristol.* (2)

I come to the conclusion, therefore, that in this case there are two hotchpot clauses, each having reference to the special fund and limited to that.

Solicitors: *Paines, Blyth & Huxtable; Sharpe, Pritchard & Co., for Alsop, Stevens, Crooks & Co., Liverpool; T. F. Adshead.*

(1) [1912] 1 Ch. 794. (2) [1897] 1 Ch. 946.

J. R. B.

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[1912 W. 2360.]

Charity—Cy-près—Gift for a School—Failure of Particular Object.

A testator gave all his property to his three daughters and their children, his will continuing as follows: "But if all die without issue" —which event happened—"I give and bequeath the whole principal of their fortunes, the interest to be given to a schoolmaster as a part of his salary. The school and his house to be erected by voluntary subscriptions from the landowners and proprietors of the parish of A., and the school and house to be placed on a hill near to the gate that divided B. and W. Commons . . . . The master to teach five days in a week and six hours each day, Saturday and Sunday excepted, to be able to instruct the pupils in Latin and Greek and all the elementary parts of mathematics, both pure and mixed, the W. scholars to go free, the rest to pay 2*s.* 6*d.* each at Midsummer and Christmas as quarter pence." There was evidence that there was no reasonable chance of any such school being established at or in the neighbourhood of the place where the testator directed it to be built:—

Held (subject to the Attorney-General intimating within a limited time his desire for an inquiry whether and how far it would be possible to carry out the directions in the will), that the gift fell within the class of cases where on the true construction of the will no paramount general charitable intention could be inferred, but the gift was for a particular purpose; and that, as it was impossible to carry out that purpose, the gift failed altogether.

THE REVEREND DANIEL WILSON, vicar of Camerton in the county of Cumberland, made his will in paragraphs numbered 1 to 7. By paragraph 1 he gave all his money he possessed at his death, which with his life assurance moneys he directed to be invested in Government or certain railway shares, "the interest of it for the benefit of my three daughters, viz. Sarah Esther, Clara Frances, and Adah Rowena Wilson, to be divided amongst them in the following manner—Sarah Esther to have four parts of the interest, Clara Frances three parts, and Adah Rowena three parts, during their natural lives—and if any of them should die leaving no offspring her share to be divided between the two remainders, but if any should marry and leave children, at the death of their aunts and their mother to have

the principal divided equally among them when twenty-one years of age; but if any one should marry her interest of the money to be divided equally between the two single ones during their joint lives and then the whole of the interest to go to the married one or her children in equal shares until they be twenty years of age." By paragraph 2 the testator gave his daughter Sarah Esther certain chattels personal. By paragraph 3 he gave to his daughter Clara Frances certain other chattels personal. By paragraph 4 he gave to his daughter Adah Rowena certain other chattels personal. By paragraph 5 he gave all other articles of domestic use and certain china, silver, knives, and decanters for the mutual use and benefit of all three daughters.

The rest of the will was as follows: "6. But if all die without issue I give and bequeath the whole principal of their fortunes, the interest to be given to a schoolmaster as a part of his salary. The school and his house to be erected by voluntary subscriptions from the landowners and proprietors of the parish of Aikton, and the school and house to be placed on a hill near to the gate that divided Biglands and Wampools Commons (now enclosed). The master to teach five days in a week and six hours each day, Saturday and Sunday excepted, to be able to instruct the pupils in Latin and Greek and all the elementary parts of mathematics, both pure and mixed, the Wampool scholars to go free, the rest to pay the master 2*s.* 6*d.* each at Midsummer and at Christmas as quarter pence. And I appoint the Rector of Aikton and Rector of Kirkbride for the time being and their successors for ever. All my library books, maps, &c., &c., after the death of my three daughters to the school for the benefit of the pupils. The master to have two weeks holiday at Midsummer and three at Xtmas, and be allowed to take boarders, the rooms of the house to be over the school. 7. I also appoint George Gill Mounsey and his son Robert Mounsey trustees to this my last will and testament, to invest the money to the greatest advantage. I likewise appoint my two daughters, Clara Frances and Sarah Esther, executrixes to my will and testament. To this last will and testament I have set my seal and signature this 4th day of December, 1870, in the presence of the two witnesses to the will."

The testator died on December 7, 1870, and his will was

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proved by Clara Frances Wilson, who solely carried on the administration of the estate until her death. Sarah Esther Wilson died a spinster in 1885 and by her will gave all her real and personal estate to Adah Rowena Wilson, whom she appointed her executrix and who proved her will.

Adah Rowena Wilson died in 1886, having by her will given Clara Frances Wilson a life interest in the income of her estate and subject thereto given the whole of her estate to W. F. Simpson, and appointed him and G. G. Mounsey her executors. They proved her will in May, 1886.

Clara Frances Wilson died on May 6, 1912, and letters of administration to her estate were on July 1, 1912, granted to Henry Nicholson Twentyman. On August 30, 1912, letters of administration de bonis non to the estate of the testator were granted to Twentyman.

G. G. Mounsey and Robert Mounsey, the trustees of the testator's will, never acted in the trusts thereof and died long before the commencement of the proceedings in this case.

The testator's estate consisted of a small sum of cash and India 3½ per cent. Stock and East Indian Railway 3½ per cent. Debenture Stock, the total value being under 1000*l.*

Twentyman took out an originating summons, to which William F. Simpson (surviving personal representative of Sarah Esther Wilson), the present rectors of Aikton and Kirkbride (trustees of the charitable bequest), and the Attorney-General were defendants, raising the following questions:—(1.) Whether on the true construction of the will of D. Wilson and in the events which had happened the bequest contained in clause 6 thereof was a good charitable and valid gift; (2.) if question 1 should be answered in the affirmative, how the gift should be dealt with or disposed of, and, if question 1 should be answered in the negative, whether the testator died intestate in respect of the property comprised in the bequest, or how otherwise.

The evidence shewed that Aikton was a country or rural parish about 6½ miles in length from north to south and two miles in breadth from east to west, and about ten miles from Carlisle and four miles from Wigton; that it contained the

villages of Aikton, Biglands, Gamelsby and Wiggonby, and a few hamlets, of which Wampool was one; that at the date of the testator's will there were only two schools in the parish of Aikton, namely, Wiggonby School and Aikton School; that the former school was founded and endowed in 1792 for the purpose of educating the poor children in the parish of Aikton, and other children, in the principles of the Church of England, that it had an endownment yielding an income of 227*l.* per annum, and that it had been rebuilt and accommodated about 120 scholars; that Aikton School was in the village of Aikton, was created about 1775 as a Church of England and parish school, now accommodated, with the help of voluntary subscriptions, from thirty-three to forty-four scholars, and was used as a girls' and infant school; that a third school, Biglands School, was erected in 1900, by voluntary subscriptions and other efforts, and accommodated about sixty scholars, was about a mile and a quarter from the site suggested in the testator's will, and that this school was attended not only by infants but by older children from the locality. There was also evidence that the present master of Wiggonby School was able to teach the necessary Latin, Greek, and mathematics, and that the teachers of the two other schools were both females. The two rectors who were defendants also submitted that the testator's intention was to benefit education in Biglands and Wampool at the west side of the parish of Aikton in a similar way to that already done by the founders of Wiggonby School at the east end of the parish.

In a letter dated November 23, 1912, from the Board of Education to the Treasury Solicitor it was stated "that there is not, in the opinion of the Board, any reasonable probability that such a scheme as is contemplated by the trusts will be established at Aikton."

The plaintiff in his evidence stated that he was informed that the present schools were sufficient for the educational needs of the parish and that there was little or no likelihood of any school such as that referred to in the testator's will, or any other school, being erected in the parish.

The summons was adjourned into Court and heard before Parker J.

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Lavington, for the plaintiff, stated the facts and the questions involved.

A. Grant, K.C., and *Heckscher*, for the defendant W. F. Simpson. The gift does not shew a general charitable intention for the promotion of higher education in a particular district. The will is precise in its terms as to the purposes for which the money is left. There is no likelihood of such a school being erected, and, the gift having failed, the property goes to the next of kin. "If the gift is for a charitable purpose, the question is, is the testator's intention to promote some specific and well defined purpose and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way. In the former case the gift fails if the purpose cannot be carried out": Theobald on Wills, 7th ed. p. 378. Where there was a legacy to the trustees of a dissenting chapel to be applied towards the discharge of a mortgage on the chapel, Sir R. P. Arden M.R. said it was insisted that the bequest of the money was within the so-called Statute of Mortmain and also "that if this legacy is not void under that statute, inasmuch as at the death of the testator the mortgage was paid off, and therefore that object cannot now be attained, it is not applicable to any other purpose for the benefit of that society; and as the object pointed out by the will cannot arise, the fund will belong to the residuary legatees. I am in their favour upon both points": *Corbyn* v. *French*. (1) He also refers (2) to *Attorney-General* v. *Bishop of Oxford* (3), where the gift was to build a church at a particular place, and owing to certain objections the church could not be built, and the gift was held to fail altogether. Where a testator desired that if his residuary personalty should be sufficient it should be applied in purchasing a presentation of a boy to Christ's Hospital, and the residue proved insufficient, it was held that the charitable intent could not be executed cy-près and that the gift was wholly void: *Cherry* v. *Mott*. (4) Other instances where the gift has been held to fail are afforded by *In re White's Trusts* (5), *In re Rymer* (6),

(1) (1799) 4 Ves. 418, 427.
(2) 4 Ves. 431.
(3) (1786) 1 Bro. C. C. 444, n.
(4) (1836) 1 My. & Cr. 123.
(5) (1886) 33 Ch. D. 449.
(6) [1895] 1 Ch. 19.

Russell v. *Kellett* (1), and *In re University of London Medical Sciences Institute Fund.* (2) [They also referred to *Chamberlayne* v. *Brockett* (3) and *Burgess's Trustees* v. *Crawford.* (4)]

[PARKER J. referred to *Biscoe* v. *Jackson.* (5)]

R. H. R. Reeve, for the defendant rectors. The gift shews a general charitable intention, namely, to support higher education in a particular district. Assuming that there is no chance of obtaining the voluntary subscriptions referred to in the will, the fund should be applied in some way for the benefit of local education. The case is not like *In re Rymer* (6), where the particular institution intended to be benefited had ceased to exist in the testator's lifetime. Where there is a gift to an institution which has never existed, the Court may draw the inference of a general charitable intention with reference to the money given to it: *In re Davis.* (7)

Where the general charitable intent can be ascertained, details may be ignored as they were in *Biscoe* v. *Jackson* (5) and *Chamberlayne* v. *Brockett.* (3)

Sargant, for the Attorney-General. If a general charitable intention can be found, it is immaterial that effect cannot be given to it in the particular way pointed out. For instance, where there was a gift of an annual sum or exhibition to maintain Scotchmen at the University of Oxon, to enter into holy orders as soon as capacitated by the canons of the Church of England, to be sent to Scotland to propagate Church of England doctrines there, and by reason of a statute the charity could not take place according to the letter and express direction of the will, nevertheless the charity was directed to be performed cy-près: *Attorney-General* v. *Guise.* (8) And where a testator directed bread to be given to poor persons attending divine service and "chaunting his version of the Psalms," but these could not be "chaunted because not authorised," it was held that the general object of the testator was to give the poor people the bread "and the chaunting the Psalms was only accessary, because he thought

(1) (1855) 3 Sm. & Giff. 264.
(2) [1909] 2 Ch. 1.
(3) (1872) L. R. 8 Ch. 206.
(4) 1912 S. C. 387.
(5) (1887) 35 Ch. D. 460.
(6) [1895] 1 Ch. 19.
(7) [1902] 1 Ch. 876.
(8) (1692) 2 Vern. 266.

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his version as good as any other": *Brantham* v. *East Burgold.* (1) Other cases supporting the contention of the Attorney-General are *Attorney-General* v. *Andrew* (2); *Mills* v. *Farmer* (3); *Bunting* v. *Marriott.* (4) In *Biscoe* v. *Jackson* (5) a testator had directed his trustees to set apart money to establish a soup kitchen and cottage hospital in the parish of Shoreditch in such manner as not to violate the Mortmain Acts, and although the particular purpose of the bequest had failed, the Court of Appeal held that a general charitable intention was shewn to benefit the poor of the parish of Shoreditch and that the trust must be executed cy-près. That is a distinct authority in my favour, although some of the observations made in the case may have gone too far. What was done in *Attorney-General* v. *Bishop of Oxford* (6) was in the nature of a compromise; and *Cherry* v. *Mott* (7) is always treated as a case of a conditional legacy.

[PARKER J. referred to *New* v. *Bonaker.* (8)]

The principle applicable was laid down by Lord Eldon L.C. (the inclination of whose mind was against any extension of the cy-près doctrine) in *Mills* v. *Farmer* (9), where he said: "Although the mode in which a legacy is to take effect is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold that the mode is of the substance of the legacy; but will effectuate the gift to charity, as the substance, providing a mode for that legatee to take, which is not provided for any other legatee." [He also referred to *Attorney-General* v. *Price.* (10)]

PARKER J. For the purposes of this case I think the authorities must be divided into two classes. First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the

(1) Cited 2 Ves. Jun. 388.
(2) (1798) 3 Ves. 633.
(3) (1815) 19 Ves. 483.
(4) (1854) 19 Beav. 163.
(5) 35 Ch. D. 460.
(6) 1 Bro. C. C. 444, n.
(7) 1 My. & Cr. 123.
(8) (1867) L. R. 4 Eq. 655.
(9) 19 Ves. 486.
(10) [1912] 1 Ch. 667; 28 Times L. R. 283.

paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. In fact the will will be read as though the particular direction had not been in the will at all, but there had been simply a general direction as to the application of the fund for the general charitable purpose in question.

Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift,—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument.

I have to determine whether the gift in this will, which is in form a particular gift, is a gift really for a particular charitable purpose, and for that purpose only, or whether there is a paramount intention to be gathered from the will that the money shall in any event be applied for some more general charitable purpose even if the particular mode of application which is prescribed cannot be carried into effect. One of the peculiarities of this case is that there is nothing, as far as I can gather, in any other part of the will which throws any light upon the question, and I simply have to consider what is the construction of the gift, which is in itself a particular gift.

As I have said in the course of the argument, if I am to take a certain view as to the decision in *Biscoe* v. *Jackson* (1), it almost necessarily follows that any particular gift may, at any rate if the particularity is not very great, be construed as a

(1) 35 Ch. D. 460.

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general gift for the purpose of deciding whether it falls within one class or within the other class. Of course, where there is a particular gift for charitable purposes, if you come to analyse the intentions of the testator, the intentions of the testator must have been to benefit those persons who will, if the particular direction is carried out, take the benefit of that particular direction, and, if from that you draw an inference that the general and paramount intention was to benefit those persons, it enables you to disregard the particularity of the gift and to give effect to that general intention as opposed to the particular intention. I do not think that that can be the effect of *Biscoe* v. *Jackson*. (1) It seems to me that there the Court was able to gather—whether I should have come to the same conclusion myself I do not know, because in cases like that different minds may very well take different views—that there was a general paramount intent for the benefit of the poor of a certain parish, although the particular directions were to establish a soup kitchen and a cottage hospital for the parish. That being the case, though a soup kitchen and cottage hospital appeared to be, or might have been, impossible, the Court held there was a good charitable gift for the benefit of the poor of the parish. Of course in that case, as was pointed out in the judgments, the particularity of the directions was not very great. The directions were to establish a soup kitchen and hospital for the parish, and they would not necessarily be in the parish, and it was rather intimated in the judgments that the more particular the directions which are given, the less is it possible to construe the will as indicating or exhibiting a paramount intention to benefit a particular class of persons.

Now in this case, after the death of these ladies, and in the event of their dying without issue, the testator gives and bequeaths the whole of the principal of their fortunes upon trusts which he declares in these words: "The interest to be given to a schoolmaster as a part of his salary. The school and his house to be erected by voluntary subscriptions from the landowners and proprietors of the parish of Aikton, and the school and house be placed on a hill near to the gate that divided Biglands and

(1) 35 Ch. D. 460.

Wampools Commons (now enclosed). The master to teach five days in a week and six hours each day, Saturday and Sunday excepted, to be able to instruct the pupils in Latin and Greek and all the elementary parts of mathematics, both pure and mixed, the Wampool scholars to go free, the rest to pay the master 2*s.* 6*d.* each at Midsummer and Christmas as quarter pence." Now it appears to me that those directions are in their nature of great particularity. In the first place the interest has to be paid to a schoolmaster, and in the second place the schoolmaster must be the schoolmaster of the school and have a house which is to be erected by voluntary subscriptions, and in the third place the house is to be placed at a particular spot. Then, in the fourth place, directions are given as to the nature of the instruction which the schoolmaster is to give to his pupils, and in the fifth place certain classes of pupils are to be admitted free, and others are to pay certain fees. It appears to be the fact that there is no reasonable chance of any such school being established at or in the neighbourhood of the place where the testator directs the school to be built, and it is, I think, in substance admitted, on behalf of the Attorney-General, that no scheme giving effect to any of these directions is practicable, and that, unless I can construe the gift as a gift for the promotion of higher education in the district, the gift must necessarily be incapable of taking effect.

The question I have to decide is whether I can reject these particular directions as not forming part of the essence of the gift, and, in the words of the cases, hold that there is a general charitable intention for the promotion of higher education in the particular district. I have nothing to help me in the will, and I have only to construe these particular directions. In my opinion, I am not justified in holding that I can disregard all the particular directions and construe the gift as a general gift for the purposes of promoting higher education. It appears to me that what the testator had in mind is, that he is dissatisfied with the provisions for the education in the district in certain respects, and that he desires that subscriptions shall be collected for the building of a school to teach certain other subjects which have not hitherto been taught, and if those subscriptions are made and

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a school house and a school are built, then he desires to endow or provide a salary for the schoolmaster subject to certain conditions as to certain scholars being admitted free and otherwise. I think that the whole gift is really in the testator's mind dependent upon it being feasible and possible to carry out these particular directions, and that I am not justified in reading into the will from this gift any such general intention of promoting higher education in the district or neighbourhood of the district as is suggested.

That being the case, it appears to me that this particular will falls under the class of cases where the gift given for a particular purpose (without there being any paramount intention to benefit any particular class of charitable objects) fails if the particular directions fail, and not within the other class of cases where one can direct a scheme because of a paramount intention to benefit a particular class of objects. It is just possible that a scheme might be framed which I might consider as in substance giving effect to the particular directions. At present I think the parties are most of them agreed that it will not be possible to do so, but I think the Attorney-General must have an opportunity of considering whether, on the judgment I have given, he would like to have an inquiry as to whether and how far it will be possible to carry out the directions contained in the will with regard to the contents of clause 6 thereof. The drawing up of the order must be postponed for a month, and if the Attorney-General desires in the meantime to have that inquiry and signifies his desire, I will direct the inquiry to be made. If he does not ask for the inquiry, I will declare that, in the events which have happened, according to the true construction of the will, the gift has failed. The costs of all parties, as between solicitor and client, will come out of the fund.

Solicitors for the plaintiffs and the defendant Simpson: *Gray, Mounsey & Fuller, for Mounsey, Bowman & Graham, Carlisle.*

Solicitor for the defendant rectors: *Arthur Toovey, for Rigg & Strong, Wigton.*

Solicitor for the Attorney-General: *The Treasury Solicitor.*

F. E.

[1913] 1 Ch. 325. MONT. *In re* BEAU- | *Distinguished. In re* PLAYFAIR, DECD. [1951] 1 Ch. 4

In re BEAUMONT.

BRADSHAW *v.* PACKER.

[1912 B. 3737.]

FARWELL L.J. (SITTING AS AN ADDITIONAL JUDGE OF THE CHANCERY DIVISION.)

1913

Jan. 30, 31.

Settlement—Power to appoint Money—Will—Trusts referring to Settlement Trusts—Power to appoint Similar Sum—Covenant to settle After-acquired Property.

By a settlement, made on the marriage of B., she was empowered to appoint that the trustees of the settlement should raise out of the settled fund any sums not exceeding in the whole 2000*l.* and pay the same to B. for her separate use. The settlement contained a covenant by B. to settle any after-acquired property of the value of 200*l.* or upwards.

The father of B., who died in her lifetime, gave a fourth of his residuary estate in trust for each of his two daughters, and directed his trustees to hold the shares "upon the same trusts and with and subject to the same powers, including the powers of investment, as are in their respective marriage settlements contained with respect to the funds thereby settled."

There were separate settlors, separate funds, and separate sets of trustees:—

Held, (1.) that B. was entitled to raise by appointment, out of her share of residue, the sum of 2000*l.*; but (2.) that the 2000*l.* was subject to the covenant as to after-acquired property.

Trew v. *Perpetual Trustee Co.* [1895] A. C. 264; *Hindle* v. *Taylor* (1855) 5 D. M. & G. 577; *Cooper* v. *Macdonald* (1873) L. R. 16 Eq. 258; and *Baskett* v. *Lodge* (1856) 23 Beav. 138, distinguished.

By a settlement made in the year 1904, on the marriage of the Reverend Bernard Packer and his wife, then Mabel Beaumont, it was provided as follows: "Notwithstanding any of the trusts and powers hereinbefore contained, Mabel Beaumont, whether coverte or discoverte, may at any time or times, by deed or will, appoint that the trustees shall (but not before her shares hereby settled have fallen into possession) raise out of the trust fund any sum or sums of money, not exceeding in the whole the sum of 2000*l.*, and pay the same to Mabel Beaumont for her sole and separate use, or to her legal representatives."

The settlement also contained a covenant by Mrs. Packer for

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the settlement of any after-acquired property of the value of 200*l.* or upwards.

Mrs. Packer's father, who died in her lifetime, by paragraphs 8 and 9 of his will made the following provisions:— "(8.) I devise and bequeath all the residue of my estate unto my trustees, upon trust for sale and conversion into money, with full power to postpone the sale and conversion of all or any part thereof for any period, however prolonged. My trustees shall stand possessed of the net residue of my estate in trust for such of my four children, namely, my sons George Beaumont and Henry Hamond Dawson Beaumont and my daughters Alice Mary Elizabeth Allen and Mabel Packer, as shall be living at my death or die in my lifetime leaving issue then living . . . . (9.) My trustees shall hold the shares of the residue of my estate which my daughters take under this my will upon the same trusts and with and subject to the same powers, including the powers of investment, as are in their respective marriage settlements contained with respect to the funds thereby settled."

The settlors were different persons, and the trustees of the will were not the same persons as the trustees of the settlement.

The following questions were raised by originating summons:— (1.) Whether, under the devise and bequest in the will of the testator's residuary real and personal estate to Mrs. Packer and her issue, upon trusts declared by reference to her marriage settlement, she was entitled to raise by appointment, out of such share, the sum of 2000*l.*; and (2.), if she was so entitled, whether the 2000*l.* came within the provision as to the settlement of after-acquired property.

Johnston Edwards, for the plaintiffs, stated the facts and the questions raised for decision.

Dighton Pollock, for Mrs. Packer. Mrs. Packer can raise, by appointment, 2000*l.* out of her share in the testator's estate. His will creates a new and separate settlement of different funds by reference to the trusts of the settlement, and does not make simply an accretion to the funds thereby settled. There are two separate settlors, two separate settlements, two separate funds, and two separate sets of trustees, and these facts are

sufficient to distinguish the case from *Hindle* v. *Taylor* (1); *Cooper* v. *Macdonald* (2); *Trew* v. *Perpetual Trustee Co.* (3) There is no reduplication of charges by means of referential trusts. [He also referred to *In re Walpole's Marriage Settlement* (4) and *Eustace* v. *Robinson.* (5)]

G. H. Devonshire, for the trustees of Mrs. Packer's settlement and her infant daughter. The intention of the testator was simply to make an accretion to the settlement funds and to blend the will and settlement funds.

[FARWELL L.J. Is there any reported case in which it has been held that two funds are blended where there are separate trustees for the two funds?]

Perhaps not. But where the settlors were different, a will creating trusts by reference to another will, it was held that the former will made an accretion to the estate given by the latter: *Baskett* v. *Lodge.* (6)

[FARWELL L.J. If, in the present case, the testator had given the share of residue to the trustees of the settlement, instead of to the trustees of his will, *Baskett* v. *Lodge* (6) might have been in point.]

The canon of construction which Mrs. Packer's counsel wishes to be applied was rejected by the Judicial Committee of the Privy Council in *Trew* v. *Perpetual Trustee Co.* (3) This canon was enunciated by Manning J., and Lord Hobbouse, in the case just cited, quotes it as follows (7): "Where there is a trust by reference 'the only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first.'" This canon of construction was rejected by Lord Cranworth L.C. in *Hindle* v. *Taylor.* (1)

[FARWELL L.J. That canon seems to be applicable to a case where, as in this case, there are separate instruments. In *Hindle* v. *Taylor* (1) and *Trew* v. *Perpetual Trustee Co.* (3) there was only one instrument.]

The fact that the testator uses the words "upon the same

(1) 5 D. M. & G. 577.
(2) L. R. 16 Eq. 258.
(3) [1895] A. C. 264.
(4) [1903] 1 Ch. 928.
(5) (1880) 7 L. R. Ir. 83.
(6) 23 Beav. 138.
(7) [1895] A. C. 267.

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trusts," and not "upon the like trusts," is conclusive that one blended fund is intended: *In re Perkins.* (1)

If, however, the will trusts constitute a separate settlement, and Mrs. Packer can raise 2000*l.* under those trusts, this sum will at once be subject to the covenant in the settlement with reference to after-acquired property.

FARWELL L.J. This summons raises two questions, one of which is of some novelty. [His Lordship read the material parts of the will and settlement, and continued:] One question is whether the provision in the will amounts to the creation of a new and separate settlement—in other words, whether the trusts and powers declared in the settlement are to be copied verbatim into the will or whether the will merely creates a fund which is to be an accretion to the funds which are subject to the trusts of the settlement. In my view the will creates a new settlement, and the canon of construction suggested by Manning J. in *Trew* v. *Perpetual Trustee Co.* (2)—that where there is a trust by reference "the only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first"—applies to the case before me.

No case cited in argument is exactly like the present. *Hindle* v. *Taylor* (3) lays down the canon of construction that in the case of a referential trust it is not, generally speaking, to be read as duplicating charges or trusts in the nature of charges. Lord Cranworth says (4): "I concur with the Solicitor-General in thinking that it by no means necessarily follows that the words, 'such trusts as are hereinafter declared,' are to be read as if the trusts so referred to were then stated. If they had been stated, no doubt would of course have remained; but I incline to think that the real way of reading the bequest is, when the testator mentions the trusts of the one-fourth by reference to the other trusts, to read it as if it had come in immediately before the declaration of the other trusts." And

(1) (1892) 67 L. T. 743; [1893] 1 Ch. 283.
(2) [1895] A. C. 264.
(3) 5 D. M. & G. 577.
(4) 5 D. M. & G. 592.

later on (1) he says: "In this case at all events, indeed I believe I should say in almost all cases, it is not a reasonable way of reading a trust, created by reference to other trusts, to consider everything as there repeated, and so to make it a duplication, as it were, of trusts in the nature of charges."

In *Cooper* v. *Macdonald* (2) a testator by his will made a series of specific devises upon trust for each of his children for life, with power for such child to appoint by will to his or her widow or surviving husband an annuity not exceeding one-third of the income of the property specifically devised to him or her for life; and he then gave his residuary real and personal estate upon and for the trusts and purposes, and with the same or the like powers, in favour of all his children, share and share alike, and their issue, as should correspond with those thereinbefore expressed and declared concerning the estates specifically devised; and Lord Selborne L.C. held that each child had power to appoint by will an annuity not exceeding one-third of the total income arising from the specifically devised estate and the child's share of residue. After referring (3) to the general rule stated by Lord Cranworth in *Hindle* v. *Taylor* (4), he says: "I think, however, that the case is different when the power is to appoint an annuity not exceeding a certain proportion of the income of the property charged therewith. In such a case, by the addition of other property to be held on the same trusts 'and subject to the same or like powers,' &c., so as to 'correspond with' those before expressed as to the property specifically devised, as nearly as the difference in the nature of the property will admit, the testator has (in effect) increased the total amount of income, of which the maximum annual charge is not to exceed a certain aliquot part. The rule of proportion still holds; but the intention is, that the power, limited by that rule, shall be applicable to the added as much as to the original property."

In both these cases, as well as in *Trew* v. *Perpetual Trustee Co.* (5),—where the opinion of Lord Cranworth was accepted, and

(1) 5 D. M. & G. 594.
(2) L. R. 16 Eq. 258.
(3) L. R. 16 Eq. 266.
(4) 5 D. M. & G. 577.
(5) [1895] A. C. 264.

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the contrary rule, as stated by Manning J., was rejected—there was only one settlor, one instrument, one fund, and one set of trustees, but in *Baskett* v. *Lodge* (1) certain property was divided into two moieties, one of which belonged to a lady and the other to her sister. One sister by her will gave her moiety to trustees upon trust for sale and out of the proceeds to pay certain legacies, and out of income to pay certain annuities. Subsequently the other sister, by her will, gave her moiety to the trustees of her sister's will to hold the same upon the same trusts, or such as should, after her decease, be subsisting and capable of taking effect "for the benefit and to the use of the same persons, and to and for the same ends, intents and purposes as were directed, expressed and declared" in and by her sister's will of and concerning the other sister's moiety. Sir John Romilly M.R. held that the second testatrix intended to add the produce of her moiety to the sister's estate, and that it was applicable in aid, in payment of such of the annuities and legacies given by the sister's will as remained unsatisfied, and subject thereto belonged to the residuary legatees mentioned in the codicil of the first testatrix. The present case is, however, different from that, inasmuch as the testator directs his own trustees, and not the trustees of the settlement, to hold the funds. By so doing I think he clearly creates a new trust, and I hold, therefore, that Mrs. Packer has power to appoint any sum not exceeding 2000*l.* out of the share of residue given to her by the testator's will. That disposes of one point.

Then comes the other question. Mrs. Packer is under a covenant, contained in the settlement, to settle after-acquired property of the value of 200*l.* and upwards, and supposing she appoints the 2000*l.* to herself, the question arises whether that would be caught by this covenant. Mr. Devonshire, quite rightly, did not attempt to argue that any sum not exceeding 2000*l.* by her to be raised under the settlement could possibly be caught by the covenant; but he did contend, and I think rightly, that different considerations apply with regard to any such appointment made as to the funds under the will if that is to be read as a new settlement. As Lord Hobhouse said in *Trew* v. *Perpetual Trustee Co.* (2), the canon of construction of Manning J. cannot

(1) 23 Beav. 138. (2) [1895] A. C. 268.

be accepted "in any sense which would give to it the general effect of multiplying charges upon the trust estate." Now, looking at the words of the referential bequest in the will before me, it is to be observed that they are "upon the same trusts and with and subject to the same powers" as are in the settlement contained. The covenant to settle after-acquired property cannot be said to be either a trust or a power, and it is only trusts and powers which are to be incorporated into the will. I must accordingly hold that if Mrs. Packer does exercise the power of appointing in respect of this sum of 2000*l.* under the will, the covenant to settle after-acquired property will apply to it.

Solicitors for all parties: *Blake, Heseltine, Child & Crailsheim.*

F. E.

In re DEMERARA RUBBER COMPANY, LIMITED.

[00396 of 1912.]

Company—Reconstruction—Notice of Dissent—Form of Notice—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 192, *sub-s.* 3.

A notice under s. 192, sub-s. 3, of the Companies (Consolidation) Act, 1908, dissenting from a resolution for reconstruction, must not only contain a declaration of dissent, but must also expressly give the liquidator the option, either to abstain from carrying the resolution into effect, or to purchase the dissentient member's interest.

Dictum of Jessel M.R. in *In re Union Bank of Kingston-upon-Hull* (1880) 13 Ch. D. 808, 810, followed.

SUMMONS.

On July 8 and July 23, 1912, special resolutions for the voluntary winding up and reconstruction of the above company (involving the transfer of its business to a new company in consideration of an allotment of shares in that new company) were passed and confirmed, and the applicant was appointed liquidator.

On July 27, 1912, the respondent, a dissentient member, gave the following notice of dissent to the liquidator:—"I the undersigned in compliance with sub-section 3 of section 192 of the Companies (Consolidation) Act, 1908, express my dissent to the

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resolutions authorizing the voluntary winding up and reconstruction of the Demerara Rubber Company, Limited, and I request you in accordance with such section to acquire my interest in the manner therein provided."

On August 27, 1912, the liquidator replied objecting that the notice was "out of order, as it does not fully comply with the provisions of sub-s. 3 of s. 192 of the Companies (Consolidation) Act, 1908," and on November 8, 1912, he issued this summons for a declaration that the respondent had not expressed his dissent in the manner specified in s. 192 and for an injunction to restrain him from proceeding to arbitration under the said section.

Vernon, for the liquidator. The notice is bad as it does not give the liquidator the option of abstaining from carrying the resolution into effect, but merely requires him to purchase the respondent's interest. The notice must mention both alternatives: Buckley on Companies, 9th ed. p. 436; *In re Union Bank of Kingston-upon-Hull.* (1) In that case Jessel M.R. gave a judicial construction of ss. 161 and 162 of the Companies Act, 1862 (25 & 26 Vict. c. 89). The language of those sections was substantially adopted by the Legislature in s. 192 of the Companies (Consolidation) Act, 1908, which must therefore be construed accordingly.

Talbot Crossfield, for the respondent. Sect. 192, sub-s. 3, provides that if any member who did not vote in favour of the resolution expresses his dissent in writing in manner therein mentioned, he "may" require the liquidator either "to abstain from carrying the resolution into effect," or "to purchase his interest," the option being with the liquidator under sub-s. 4. Reading "may" as "must" the notice ought to be not merely that he dissents, but that he dissents and requires the liquidator to do "one" of the two things mentioned in the section: Buckley on Companies, 9th ed. p. 436. That is exactly what the respondent has done here.

"A shareholder can either (1.) assent, or (2.) dissent, and within seven days require his interest to be purchased, or (3.) dissent and abandon all his interest in the company": Buckley

(1) 13 Ch. D. 808, 810.

on Companies, 9th ed. p. 435. Clause 2 of the above passage has been exactly complied with.

Assuming, however, that those passages do not state the exact requirements of the section, a substantial compliance is sufficient: *Brailey* v. *Rhodesia Consolidated, Ld.* (1) The present notice clearly imports the whole of s. 192, sub-s. 3, with its two alternatives and mentions the alternative preferred by the respondent. It cannot and does not purport to deprive the liquidator of his statutory option. Surely a dissentient member cannot be bound to ask for something he does not want, any more than a lessor serving the preliminary notice of forfeiture of a lease for breach of covenant is bound to ask for compensation if he does not want it, although the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, expressly requires a notice specifying the breach, requiring it to be remedied, "and, in any case, requiring the lessee to make compensation in money for the breach": *Lock* v. *Pearce.* (2)

In *In re Union Bank of Kingston-upon-Hull* (3) there was really no notice of dissent at all. The dissentient member merely wrote "Please to take notice that I do not intend to become a shareholder in the Hull District Bank, Limited, and also that I require the amount of 200*l.* which I have paid to the Union Bank of Kingston-upon-Hull to be paid to me immediately." (4) Jessel M.R., while admitting that the point did not actually arise, expressed his opinion that the notice of dissent should contain the requisition "either" to abstain from carrying the resolution into effect, "or" to purchase the shares. But he was really only dealing with the question of time, and not with the actual form of the requisition. The requisition was to be contained in the notice. The section could not mean that a member was to give "notice to abstain" after the resolution had been carried into effect. He held on the facts that there had been no "notice of dissent" or "requisition to purchase," evidently omitting the alternative "requisition to abstain" as immaterial. This is obviously the view taken in Buckley on Companies, 9th ed. pp. 435, 436.

Assuming, however, that Jessel M.R. conceivably meant that the notice of dissent must state both alternative requirements,

(1) [1910] 2 Ch. 95.
(2) [1893] 2 Ch. 271.
(3) 13 Ch. D. 808, 810.
(4) 42 L. T. 391.

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his opinion was only a dictum in the way of a counsel of perfection, and cannot be treated as a decision that none but notices attaining that standard are good. The present notice is substantially, if indeed not exactly, in compliance with the section. The objection is purely meticulous and ought to be disregarded.

SWINFEN EADY J. (after stating the facts). The question is whether the notice of dissent was sufficient within s. 192. It is to be observed that s. 192 of the Companies (Consolidation) Act, 1908, is substantially the same as ss. 161 and 162 of the Companies Act, 1862, and the option either to abstain from carrying the resolution into effect, or to purchase the dissentient member's interest, lies with the liquidator and not with the dissentient member. If the liquidator determines to purchase the interest, the price is to be determined by agreement, or by arbitration in manner provided in sub-s. 6.

The respondent, apparently under the impression that the option lay with himself and not with the liquidator, purported to exercise the option and required the liquidator to purchase his interest, without specifying the alternative course open to the liquidator.

Now in 1880 Jessel M.R. in *In re Union Bank of Kingston-upon-Hull* (1) expressed his opinion that a notice of dissent under ss. 161 and 162 of the Companies Act, 1862, must also contain a notice to the liquidator either to abstain from carrying the resolution into effect, or to purchase the shares. He gave his reasons as follows:—

"The Act of Parliament says that he shall express his dissent within a certain time, that is, by writing addressed to the liquidator, not later than seven days after the date of the meeting, and 'such dissentient member may require the liquidators to do one of the following things.' Surely that requisition is to be in writing, as well as the notice expressing his dissent. The meaning is that the whole is to be one notice in writing. The member may require the liquidators 'either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned.'

(1) 13 Ch. D. 808, 810.

"Here again a limit as to time is necessary. The section cannot mean that the member is to give the liquidators notice to abstain from carrying the resolution into effect, after it has been carried into effect. There must be some limit of time: it cannot be intended that the notice may be given a moment before the resolution is carried into effect, or an hour before. It is obvious that the limit of time is as much required for that notice as it is for the notice of dissent, so as to enable the liquidators to decide what to do.

"The fair reading of the section is that the whole is to be in writing, and the whole is to be left not later than seven days after the passing of the resolution, so that the liquidator may have ample time to know what course he is to take. Any other construction, it appears to me, would lead to the greatest possible inconvenience, and, assuming that two readings are possible—which is the most favourable way of putting it—I think convenience requires the reading which I adopt."

A knowledge of the judicial construction thus put on ss. 161 and 162 of the Companies Act, 1862, must be imputed to the Legislature.

In *Barlow* v. *Teal* (1) Lord Coleridge C.J. states it as a general principle that "where cases have been decided on particular forms of words, in Courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts shewing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them."

That rule is applicable here, as on this point s. 192 of the Companies (Consolidation) Act, 1908, uses substantially the same form of words as those judicially construed under ss. 161 and 162 of the Companies Act, 1862.

This is the view taken in Buckley on Companies, 9th ed. p. 436, namely, "The dissentient shareholder's notice ought to be not merely that he dissents, but that he dissents and requires the liquidators to do one of the two things mentioned in the section." That means that he must require the liquidators at

(1) (1885) 15 Q. B. D. 403, 405.

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their option either to abstain from carrying the resolution into effect or to purchase his interest. It does not mean (as was argued) that the shareholder has the option.

The result is that this notice is insufficient. No doubt it refers to s. 192, but it purports to exercise a right which that section does not confer on the dissentient member.

Vernon. The liquidator is content with that declaration and does not ask for an injunction. This is really a test case, as there are numerous similar notices in this liquidation. If the respondent undertakes not to appeal, the liquidator will not object to an order for payment of his solicitor and client costs out of the assets.

Crossfield. I am instructed to accept that offer.

SWINFEN EADY J. Very well. By consent, and the respondent undertaking not to appeal, the costs of both parties as between solicitor and client will be paid by the liquidator out of the assets.

Solicitors : *Vernon, Stephen & Co.; Heywood & Ram.*

G. R. A.

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Jan. 21, 22, 23.

[1912 K. 281.]

Urban Authority—Building Owner—Deposited Plans passed—Length of New Street defined on Plans—New Street constructed—Cul-de-sac—Houses built—By-laws—Paignton Improvement Act, 1898 (61 & 62 *Vict. c. cclvii.*), *ss.* 46, 48, 50—*Building Owner's Right to enclose Dead End of Cul-de-sac—Alleged Highway—Dedication—Evidence—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 157—*Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 17.

In 1907 the plans of a building estate deposited by the owner were passed by the local authority. The plans shewed an intended new street with a southern outlet into a highway and extending northwards therefrom some distance without an outlet, so that it was a cul-de-sac. The plans also shewed the land on the east side of the new street plotted out for the erection of houses. The new street was constructed, kerbed and channelled on its eastern side with a footpath, at the cost of the owner and to the satisfaction of the local authority, who, as the water authority, laid a water main in the new street. A gas main was also laid therein. By 1910 the owner had disposed of all the plots except the two northernmost plots, and had granted to his purchasers or lessees a right of way over the new street, and houses were built. In September, 1910, K. bought the two remaining plots and the north end of the new street so far as it was conterminous with the two plots, with a right of way over the new street up to the two plots, and erected a fence with an opening for gates across the new street in a line with the southern boundary of the two plots, thus enclosing the north end of the new street he had bought. The local authority had not taken over the street or expended any public money upon it, but alleged that the new street throughout its entire length had been dedicated to the public and had become by user a highway, and threatened to pull down and remove the fence. In an action by K. to restrain the local authority from interfering with or pulling down his fence:—

Held, on the evidence, that the new street had not by dedication or user become a highway, but was a private road.

Held, also, that the by-laws and special Act of the local authority dealt only with the width and level, and not with the length, of new streets, and therefore that, in the absence of an order under s. 17 of the Public Health Acts Amendment Act, 1907, the owner was entitled to deviate from the plans and to enclose the north or dead end of his private road.

An injunction was granted accordingly.

ACTION.

This was an action to restrain the defendants from pulling

NEVILLE J. down a dwarf wall which the plaintiff had built across the top of a cul-de-sac, known as Fortescue Road, which he claimed as his own private property, and which the defendants claimed to be part of a highway.

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In November, 1906, one Gwatkin, the owner of freehold building land adjoining the north side of the Torquay Road, a highway in the defendants' district, deposited plans with the defendants. The plans shewed a proposed new road, to be called Fortescue Road, opening at its southern end into the Torquay Road, and extending northwards about 740 feet without an outlet, so that it was a cul-de-sac. The plans also shewed that a strip of land, one foot wide, was reserved by Gwatkin on the extreme boundary of his land all round Fortescue Road, except its southern end, so as to prevent adjoining owners from getting any right of way over it when made. The plans also shewed that a surface water drain was to be constructed in the road and that Gwatkin's land on the east side of the road was plotted out for the erection of a terrace of houses. Subsequently Gwatkin amended his plans by altering the terrace of houses into seventeen plots of land for the erection of detached and semi-detached houses. On January 21, 1907, the amended plans were passed by the defendants. By the end of March, 1907, Fortescue Road was made up, kerbed, and channelled, with a footpath on the east side thereof and the surface drain throughout its entire length, except a few feet at the north end thereof, to the satisfaction of the defendants by a contractor employed and paid by Gwatkin.

In April, 1907, Gwatkin put up the seventeen plots for sale by public auction on building leases subject to conditions of sale which (inter alia) provided—

"19. The lessees shall not be entitled to or acquire any right of light or any other rights or easements of any kind soever over any adjoining land remaining undisposed of which would at any time hereafter limit, restrict or interfere with the full and free right and liberty of the lessor or his executors administrators or assigns to build upon such adjoining land.

"20. No part of the site of any road opposite any lot is included in the lease or sale of such lot.

"21. Every lessee shall in respect of each lot pay to the lessor the yearly sum of 1*l.* 1*s.* for the use of the road made and the sewers laid by the lessor until the same are taken over by the local authority, and such payment shall be made on the 25th of March in every year."

No lot was disposed of at this sale.

In April, 1907, Gwatkin negotiated with Bridgman, the owner of the land to the north of Fortescue Road, with the object of continuing that road northwards through Bridgman's land to the Buckland High Road, which was a highway, but the negotiations fell through.

In August, 1907, Bridgman removed his boundary hedge facing the north end of Fortescue Road, and only separated therefrom by Gwatkin's strip of land one foot wide, and built a wall in the place thereof and erected a house on his land, so that any continuation northwards of Fortescue Road was completely blocked, and it remained a cul-de-sac.

During the years 1908 to September, 1910, Gwatkin sold or leased plots 1 to 15, and houses were erected thereon, and in every conveyance and lease Gwatkin granted a right of way over Fortescue Road, and every grantee and lessee (as the case might be) covenanted in the terms of the 21st condition of sale above stated. During this period a gas main was laid in Fortescue Road to within thirty feet of its northern end, and from thence a pipe was run by the gas company, with Gwatkin's permission, to and under Bridgman's boundary wall to supply his premises with gas. A water main was also laid in the road by the defendants as the water authority under s. 51 of the Public Health Act, 1875.

In September, 1910, Gwatkin sold and conveyed to the plaintiff plots 16 and 17 and the land forming the northern end of Fortescue Road so far as it was conterminous with the two plots, and included in the conveyance so much of the strip of land one foot wide as lay between the north end of Fortescue Road and the two plots, and the strip forming the northern boundary of that road, and the whole of the strip forming the western boundary of that road, and granted the plaintiff a right of way over Fortescue Road up to the two plots; and the

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plaintiff covenanted in the terms of the 21st condition of sale above stated, and also covenanted to erect a fence along the southern boundary of the land conveyed to him.

In August, 1911, the plaintiff deposited plans with the defendants for the erection of a house on plots 16 and 17 and shewing the north end of Fortescue Road enclosed as part of his property. These plans were passed by the defendants, at any rate so far as the house was concerned, although a dispute subsequently arose as to whether they had sanctioned the enclosure of the top or north end of Fortescue Road. The plaintiff built his house, and in February, 1912, in pursuance of the covenant in his conveyance, erected a dwarf brick wall about 4 ft. 6 in. high with entrance gates across the southern boundary of his land, thereby enclosing the north end of Fortescue Road and intending to use it as a private road and approach to his house.

In March, 1912, the defendants served the plaintiff with a notice requiring him to remove the dwarf wall and threatening, if he did not do so, to pull down and remove it themselves. After some correspondence the plaintiff commenced this action claiming an injunction to restrain the defendants from removing or interfering with his wall.

The defendants by their defence alleged that Fortescue Road throughout its entire length from the Torquay Road to the northern boundary of the plaintiff's land was a public highway, that the plaintiff had contravened their by-laws and the provisions of the Paignton Improvement Act, 1898, by encroaching upon it and enclosing about ninety feet of its northern end by the erection of the dwarf wall, and that as surveyors of highways they were justified in preventing the obstruction of the highway. The defendants had not taken over the road or expended any public money upon it.

The evidence of dedication and of the user by the public of Fortescue Road is sufficiently noticed in the arguments and judgment.

The Paignton Improvement Act, 1898 (61 & 62 Vict. c. cclvii.), enacts :—

Sect. 46. "The approval by the council of any plan or section

of any street or building shall be null and void if the execution of the works specified in such plan or section shall not be commenced within the following periods (that is to say):—As to plans approved after the passing of this Act within three years from the date of such approval . . . ."

Sect. 48. "The council may by order vary or alter the position direction or level of any intended new street for the purpose of causing it to communicate in a direct or more direct line with any other street adjoining or leading thereto. The council shall make compensation to any person who may be injuriously affected by the exercise of the powers conferred by this section."

Sect. 50. "No person shall in any new street commence to erect any new building or to excavate for the foundation thereof until the whole length of the street shall have been defined by posts or in some other sufficient manner to the satisfaction of the council to indicate the approved line and level thereof. Any person who shall offend against this section shall be liable to a penalty not exceeding five pounds and to a daily penalty not exceeding twenty shillings."

Sect. 48 of this Act is repealed, and is reproduced with additions in s. 17 of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), which enacts:—

Sect. 2 that the Act shall be construed as one with the Public Health Acts, and shall come into operation on January 1, 1908.

Sect. 17. "(1.) The local authority may, on the deposit of a plan and sections of a new street in pursuance of a bye-law in force in the district, by order vary the intended position, direction or termination, or level of the new street so far as is necessary for the purpose of securing more direct, easier, or more convenient means of communication with any other street or intended street, or for the purpose of securing an adequate opening at either end of the new street, or of securing compliance with any enactment or bye-law in force in the district for the regulation of streets and buildings.

"The local authority may also by their order fix the points at which the new street shall be deemed to begin or end, and the limits of the new street as determined by the points so fixed shall have effect for the purposes of the Public Health Acts, 1875

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to 1907, and of any bye-laws made under those Acts and in force within the district.

"(2.) The powers of the local authority under this section shall not be exerciseable in any case in which it is shown, to their satisfaction, that compliance with their order will entail the purchase of additional lands by the owner of the lands on which the new street is intended to be laid out, or the execution of works elsewhere than on those lands.

"(3.) Where the local authority make an order under this section a person shall not lay out or construct the new street otherwise than in compliance with the order. If any person acts in contravention of this provision, he shall be liable to a penalty not exceeding five pounds, and to a daily penalty not exceeding forty shillings.

"(4.) The local authority shall pay compensation to any person injuriously affected by the exercise by the local authority of their powers under this section."

Micklem, K.C., and *Cann*, for the plaintiff. The plaintiff is bound by the covenant in his conveyance to erect a fence along the southern boundary of his property, and is entitled to erect this dwarf wall across Fortescue Road, enclosing the north end of it conveyed to him, unless he has broken some by-law or the road is a public highway. The by-laws of the defendant council are made under s. 157 of the Public Health Act, 1875, which empowers them to make by-laws with respect to the width and level of streets and the construction of buildings, but this dwarf wall or boundary fence is not a "building." There is no direct authority, but it is submitted that the analogy of the decisions on the word "building" in the Metropolis Management Acts apply: *Ellis* v. *Plumstead Board of Works*. (1)

Macmorran, K.C., for the defendants. We do not say that this dwarf wall is a "building."

Micklem, K.C. Then there is nothing in the by-laws or the special Act of the defendants that applies to this fence. The by-laws only deal with the width and level, and not with the length, of new streets. The defendants rely on s. 50 of their

(1) (1893) 68 L. T. 291; 57 J. P. 359.

special Act, but that is a penal section to be construed strictly, and only prohibits building until the line of the new street is defined, and is not aimed at the state of facts that exists here; then s. 48 only empowers the defendants to vary the direction of a new street to cause it to communicate with any adjoining street, and there is no other street here; and s. 46 provides that plans shall not be good for more than two years, which implies that plans may be changed. Sect. 48 has been replaced by s. 17 of the Public Health Act, 1907, but that section does not apply. The defendants say that Fortescue Road is a public highway and the onus is on them to prove it. A cul-de-sac may be a highway, but it is very difficult to establish, and mere user of it by the public is not sufficient, where (as here) the local authority have not taken it over nor expended public money upon it: *Attorney-General* v. *Antrobus* (1); *Whitehouse* v. *Hugh.* (2) Here there has been no dedication by Gwatkin and no real evidence of public user. Every existing document shews that the road was a private road and negatives any intention to dedicate. The defendants may rely on *Tottenham Urban Council* v. *Rowley* (3), but it is distinguishable on the ground that there the new street was not a cul-de-sac, but was a road leading from one highway to another highway. The passing of plans and the laying out and making up of a proposed new street, even when followed by some public user, do not amount to dedication: *Hall* v. *Bootle Corporation.* (4)

Macmorran, K.C., and *W. W. Mackenzie*, for the defendants. There are two points—(1.) whether Fortescue Road has been dedicated to the public, and (2.) whether, apart from dedication, a building owner, whose plans defining a new street have been passed and who has constructed the street throughout its length to the satisfaction of the local authority, can afterwards recall what he has done and enclose part of that street. It is true that when plans are submitted and passed shewing an intended new road, that does not bind the owner to carry out the plans. But here there was much more than that. Two or three sets of plans were submitted, and the amended plans passed

(1) [1905] 2 Ch. 188, 206.
(2) [1906] 2 Ch. 283.
(3) [1912] 2 Ch. 633.
(4) (1881) 44 L. T. 873.

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shewed a new road of defined length and width. Under s. 50 of the special Act it was necessary that the whole length of that road should be defined by posts, &c., before any one could build along it. The plaintiff knew this, and did not attempt to build before the road had been made up, kerbed, and channelled its whole length with a footpath in manner prescribed by the by-laws. The object of the section is to prevent a person who has defined a road from altering it. As soon as he had constructed the street, certain powers of the local authority at once arose under s. 48 of the special Act, and they could have required him to alter or vary the street. That section is repealed, but has been reproduced in s. 17 of the Public Health Act, 1907, which has been adopted by the defendants. Therefore as soon as a man lays out and constructs a new street so that it is a visible road and is approved by the local authority it is a "street" within the definition of that expression in s. 4 of the Public Health Act, 1875, and s. 5 of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), and the by-laws of the defendants, and the defendants acquired extensive powers over it under the Act of 1892, including a power under s. 19 of that Act by giving notice to declare it a highway repairable by the inhabitants at large. Therefore the moment a new street has been constructed and approved by the local authority so that they have the power to take it over, it is too late for the owner to recall what he has done and to enclose any part of it. *Hall* v. *Bootle Corporation* (1) does not support the plaintiff's contention, and the facts there were very different. Then as to dedication. It is no objection that the road is a cul-de-sac. Such a road can be dedicated. It is a question of evidence, and where, as here, the owner has not put up any prohibition or notice to the public, then very slight evidence of user by the public will support dedication. The principles applicable to cases of this kind are indicated in *Rex* v. *Lloyd* (2); *Attorney-General* v. *Richmond Corporation* (3); *Attorney-General* v. *Chandos Land and Building Society* (4); *Josselsohn* v. *Weiler*. (5) Here the owner has done

(1) 44 L. T. 873.
(2) (1808) 1 Camp. 260.
(3) (1903) 68 J. P. 73.
(4) (1910) 74 J. P. 401.
(5) (1911) 75 J. P. 513.

nothing to indicate to the public that they were not to use the road, and every document relied on by the plaintiff supports the inference that the owner contemplated dedication, because in every conveyance and lease he included a covenant that the grantee or lessee should contribute to the repair of the road until it was taken over by the local authority as a highway repairable by the inhabitants at large, and it was kerbed and channelled and sewered with that view. Moreover the surface drain is vested in the defendants and they have laid a water main in it, and placed a hydrant a few feet within the dwarf wall and use it periodically to flush the drains. They also police the road and light the gas lamp that has been erected in it. These facts coupled with the fact that the public have gone up the road and through the gaps in the hedge that bounded it on the north and so across the land beyond to the Buckland High Road until Bridgman built his wall are, it is submitted, sufficient evidence of dedication.

Micklem, K.C., in reply.

NEVILLE J. For the purpose of my judgment I will deal with this case upon the footing that Fortescue Road was a "new street" within the meaning of the by-laws of the defendants, and I think that the substantial question I have to decide is whether, under the circumstances, the local authority were entitled to prevent Mr. Kirby from enclosing the end of the street which was conterminous with the boundary of the two plots 16 and 17 purchased by him on the east side of the street. From my point of view the evidence with regard to what took place in September, 1911, with respect to the plaintiff's plans has no material bearing on the points I have to decide.

The first point is, whether Fortescue Road was a private road in the sense of being the property of an individual owner, or individual owners, without any right of the public to proceed along it, and that raises the question whether there has been such a dedication of the road as to make it a public highway. Dealing first with the evidence of user, it seems to me that the evidence tendered is of such a character as to make it quite impossible to draw any inference of dedication on the part

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of the owners. If I were to give weight to the evidence as to people using Fortescue Road and then going through gaps first made in one direction and then in another in the fence bounding it on the north, and filled up from time to time by the owners of the fence in which the gaps were made, I should be treating the evidence as evidence of a dedication not only of Fortescue Road but of all the way along the more or less open ground which was ultimately going to be used for building purposes from the end of Fortescue Road up to Headland Park Road. It was a short cut over those pieces of ground. The people who used those gaps and who went along Fortescue Road and thus to Headland Park Road were trespassers—persons who went with the deliberate intention of going over land which they knew they had no right to go over. If that is true of their position when they passed through the gap, there is no inference that it was not equally true of their position before they came to the gap. They were not people who were careful only to exercise what they supposed to be their legal rights. They knew they were doing something which, strictly speaking, was not legal. They were doing no harm. People who traverse land which is open and laid out for building, as they constantly do, making tracks in every direction, are doing no harm, and the owners do not mind, and it very often saves a considerable distance and does not hurt anybody. But if from that kind of user I were to found an inference of dedication to the public, all I can say is that every builder would have to fence in the whole of his land, or else in two or three years he would find it so cut up with public rights of way in every direction as to be wholly unfit for the purpose for which he had intended it. I think, therefore, there is absolutely no ground whatever for finding, from the evidence of user, dedication of this road to the public.

The next point is whether what has been done, apart from user by the public, is sufficient evidence of an intention on the part of the owners to dedicate this road to the public. With regard to that a good many matters have been relied upon. First it is said that this road was always intended to be a public road, and that, if you look at the documents which are

said to indicate a contrary intention on the part of the owners, you find that they themselves make provisions which are only to endure until the road is taken over by the local authority, indicating that, from the first, they anticipated and looked forward to the time when it would become a public road. I think that is perfectly true. But there is all the difference in the world between a present dedication of a road to the public when the cost of its maintenance is borne by the owner, and the position of affairs when the local authority take the road over and the owner is no longer subject to the burden of repairs. Again I think it would be a most unfortunate thing to suggest that, when a new street of this kind is made in a locality where building is progressing, the owner should have to put up a notice or a gate at the entrance to his road or take some overt steps to shew that he had not yet dedicated the road to the public. Then it is said that a sewer has been made in the road to carry off the storm-water, and that, in addition to that, a water main has been laid, and a hydrant has been placed in the site of the road a few feet within the boundary which now the plaintiff claims free from any right of the local authority. It does not seem to me that any of these things are sufficient to indicate that the road has ceased to be the private property of the owner. With regard to the hydrant, that was put in by the local authority simply as the water authority in the place; and if they choose to put hydrants into another man's property, and any inconvenience results to them, so much the worse for them, but I cannot conceive that the effect of that is to transfer the property or give them any right which they would not possess otherwise. With regard to the sewer, the sewer does not even extend to the locus in question at all, but has to do with the lower part of the road; but, there again, I do not think that the existence of that sewer (which was made by the owner himself, although it has been flushed by the water authority), or the flushing of it by the local authority, has done anything to change the right of the owner to deal with the road free from any right of passage on the part of the public, and free from any right of the local authority. Then it is said that the local authority light the one lamp in the road that was erected by one of the building

NEVILLE J. owners, and that they also police the road, which the evidence shews that they do. Neither of those things seems to me sufficient to indicate an intention on the part of the owners to dedicate. I come to the conclusion, therefore, that this road is a private road and not a public road.

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Now comes an important question in the case, and that is, Where plans have been deposited for the making of a new street and have been approved by the local authority, can the owner, under any circumstances, abandon the project of constructing the road or any part of it, or is he bound, by the approval of the local authority, to proceed with the construction of the road, or, at all events, to do nothing inconsistent with the construction of the road, in accordance with the plans which he had deposited; and, further than that, where the road has been constructed by the owner after the deposit and approval of his plans, whether that makes any difference? Now the rights of the owner must remain in his land unless there is something to take those rights away, and I must find some statutory provision to that affect if I am to hold that the owner is no longer entitled to deal with the upper portion of the road as he pleases. There is a local Act, the Paignton Improvement Act, and that Act makes certain provisions with regard to the making of new streets. One is contained in s. 50, which provides that "No person shall in any new street commence to erect any new building or to excavate for the foundation thereof until the whole length of the street shall have been defined by posts or in some other sufficient manner to the satisfaction of the council to indicate the approved line and level thereof," and penalties are imposed upon anybody who does so build. Then there is s. 48, which is now repealed, and for it is substituted the 17th section of the Public Health Act, 1907; but I will say in passing that, in my opinion, s. 48 could never apply to the present case, because it deals with the alteration of the position of the intended new street "for the purpose of causing it to communicate in a direct or more direct line with any other street adjoining or leading thereto." Here there is no other street to which it adjoins or leads, and consequently the powers given by that section never arose at all. So far I have referred to provisions dealing only with the line

and level and the direction of the street. The first time that there is any indication that the local authority have a right to interfere with regard to the length of the street, or the beginning and end of the street, is in s. 17 of the Public Health Act, 1907. There the marginal note to the section is: "Power to vary position or direction and to fix beginning and end of new streets." In the first place it is to be observed that the exercise by the local authority of the powers under this section is to be subject to the payment of compensation by them to the owner if he is injured. If they intend to exercise the powers or any of the powers under that section they have to do so by order, and when the order is made, then, if damage is occasioned to the owner, compensation is payable in consequence. Here it is enough to say that no order has ever been made, and I am brought back to the consideration of the question whether the deposit of a plan shewing a road of a particular length, coupled with the construction and channelling of that road throughout its length, or nearly throughout its length, prevents the owner from resuming, as he has done here, what one may call the dead end of the road, which, under the circumstances which arose, became unnecessary for the purpose of the development of his land for building purposes, so that he proposed to leave his street up to the last two plots and then, from there to the end of it, to enclose and treat the matter as though no street was there. In my opinion the local authority had no right to insist upon his continuing that end of Fortescue Road as a new street or a street at all. It appears to me that there is no by-law, and there is no provision in the statutes to which I have referred, in the absence of an order by the local authority, which can deprive him of the right, which to my mind is still vested in him as owner, to divert that part of the road for such purposes as he thinks fit; and that really determines the substantial question in dispute. In the view which I take of the case it is immaterial whether the local authority was right in threatening to pull down the wall or whether they ought to have resorted to some other remedy, because the only real question between the parties was whether the owner was entitled to cut off the dead end of the road and to use it as he

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thought fit. I think he was. In my judgment, therefore, the plaintiff succeeds and is entitled to have the injunction which he asks for, and the defendants must pay the costs of the action.

Solicitors: *E. Jones & Co., for Smith & Kenny, Paignton; Baker & Sons.*

H. L. F.

FARWELL L.J. (SITTING AS AN ADDITIONAL JUDGE OF THE CHANCERY DIVISION.) 1913 *Feb.* 10, 11.

In re COOPER.
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[1912 C. 3428.]

Infant—Maintenance—Maintenance Clause in Will ceasing on Marriage—Interval between Marriage and attaining Twenty-one—Income accruing before Marriage—"Contrary intention"—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

Testator, who died in 1909, directed his trustees to appropriate a share of his estate in favour of one of his daughters, and to hold the same and the accumulations (if any) of income made during her minority and discoverture upon trust from the time she attained the age of twenty-one years or previously married to pay the income to her during her life and after her death to hold the capital and income or so much thereof respectively as should not have been paid or applied under any trust or power affecting the same in trust for her issue as therein mentioned with a gift over in default of issue; and the testator declared that if at his decease any child or grandchild entitled in expectancy for life or absolutely to a share or the income thereof under his will should be under the age of twenty-one years, or being a female should be unmarried, the trustees might apply the whole or any part of the income of such expectant share of such minor for or towards his or her maintenance, and should invest the residue (if any) of the said income and the resulting income thereof at compound interest to the intent that such accumulations should be added to the principal share from which the same should have arisen and follow the destination thereof, with power for the trustees to resort to the accumulations of any preceding year and apply the same for or towards the maintenance of any person for the time being presumptively entitled thereto.

The daughter attained the age of twenty-one years on October 1, 1912, having previously married on June 12, 1912. The share consisted largely of property in Australia the income of which did not reach the hands of the trustees in this country for many months after it had accrued due. The trustees had applied income for the maintenance of the daughter down to the date of her marriage, when they

ceased to do so. On a summons raising the question whether the trustees had power to apply income accruing down to the date of her marriage for the maintenance of the daughter after that date:—

Held, that the maintenance clause in the will did not shew a "contrary intention" so as to exclude s. 43 of the Conveyancing Act, 1881, and that under that section the trustees had power to apply income accruing down to the date of the marriage for the maintenance of the daughter between the date of her marriage and the date of her attaining the age of twenty-one years, but not for any further period.

In re Thatcher's Trusts (1884) 26 Ch. D. 426, followed.

In re Wise [1896] 1 Ch. 281; 73 L. T. 743, explained.

ADJOURNED SUMMONS.

Testator, who died on June 13, 1909, by his will, dated January 11, 1908, gave all his real and personal estate in the United Kingdom, or in any British colony or dependency or elsewhere, belonging to him at his death, unto his trustees upon trust for sale and conversion with power to postpone such sale and conversion, and after payment of his funeral and testamentary expenses and all legacies and annuities to invest the residue of the moneys to arise therefrom as therein mentioned; and he declared that his trustees should stand possessed of the trust fund and the income thereof in trust to pay to his said wife until her death or second marriage the clear yearly sum of 2000*l.*, and subject as aforesaid to appropriate out of the capital of the trust fund to each of his daughters who survived him, or died in his lifetime leaving issue living at his death, investments equivalent to the sum of 50,000*l.* to be held upon the trusts and subject to the powers and provisions thereinafter declared concerning the same; and subject to such appropriation he directed that the trust fund and the income thereof should be held in trust for his son or sons as therein mentioned, and in case he should have no son (which event happened) the trust fund should be divided into as many equal shares as he should have daughters who survived him, or died as aforesaid, and one of such shares should be appropriated to each such daughter to be held upon the trusts and as one fund for all purposes with such daughter's appropriated fund. And the testator declared that the trustees should stand possessed of the appropriated fund of each daughter, or the investments representing the same, and the accumulations (if any) of income made during her minority and discoverture (which investments and

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accumulations were thereinafter included in the description of such daughter's appropriated fund), upon trust from the time such daughter attained the age of twenty-one years, or previously married, to pay the income thereof to such daughter for her life for her separate use without power of anticipation during any coverture; and the testator directed that after the death of such daughter the capital and income of the appropriated fund of such daughter, or so much thereof respectively as should not have been paid or applied under any trust or power affecting the same, should be held in trust for the issue of such daughter as therein mentioned; and in default of issue of such daughter the testator declared that her appropriated fund and all accumulations (if any) of income, or so much thereof respectively as should not have become vested or been paid or applied under any trust or power affecting the same, should accrue to and be held in trust for his other children or child who attained the age of twenty-one years, or being female married under that age, but so that every further share accruing to a daughter should be held upon the same trusts as her appropriated fund. And the testator thereby further declared that "if at my decease any child or grandchild of mine entitled in expectancy for life or absolutely to a share or the income thereof under this my will shall be under the age of twenty-one years, or being a female shall be unmarried, then, and in every such case, my trustees may apply the whole or any part of the income of such expectant share of such minor for or towards his or her maintenance and education, with liberty to pay the same to the guardian or any of the guardians of such infant for the purpose aforesaid without being liable to see to the application thereof; and shall invest the residue (if any) of the said income and the resulting income thereof so as to accumulate at compound interest to the intent that such accumulations shall be added to the principal share from which the same shall have arisen and follow the destination thereof, but my trustees may at any time resort to the accumulations of any preceding year or years and apply the same for or towards the maintenance or education of any person for the time being presumptively entitled thereto."

The testator had no son and two daughters only, Dorothy, the

wife of H. S. J. Streatfield, and Hilda Swan Ellen, who attained the age of twenty-one years on October 1, 1912, having previously married Viscount Northland on June 12, 1912. Prior to her marriage the trustees paid 500*l.* quarterly for the maintenance of this daughter to her mother under the maintenance clause in the will, but ceased to do so on her marriage.

The estate accounts were made up on June 13 in each year. The estate of the testator comprised real estate and securities in Australia, the accounts of which were made up on March 31 in each year, and included rents received in Australia up to the previous December 31 and interest up to various dates between January 1 and March 31; and the trustees now had in hand from this source large sums accrued due before the date of her marriage, representing undistributed income of Viscountess Northland's appropriated fund. It was in evidence that the effect of apportioning the income of her share at the date of her marriage, having regard to such income being to a large extent received in arrear by the trustees, was to leave Viscountess Northland without any income for some six months from the date of apportionment.

This was an originating summons raising the question whether the trustees had power to apply the income of her appropriated fund, accrued due before the date of her marriage, towards the maintenance of Viscountess Northland after the date of her marriage.

Errington, for the trustees.

Farwell, for Viscountess Northland. The income which accrued due after the date of her marriage belongs to the lady in her own right, but owing to the special circumstances of the case she was practically left without any income for a long period after her marriage. It is submitted that the trustees have power to apply the income accrued due prior to the date of her marriage when it comes to their hands for the maintenance of the lady after the date of her marriage either under the clause in the will or under s. 43 of the Conveyancing Act, 1881 (1); and the order of North J.

(1) Sect. 43 provides: "(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether

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in *In re Wise* (1) shews that the trustees can continue to so apply it even after the lady attained the age of twenty-one years.

[FARWELL L.J. The order of North J. does not bear that meaning, but I am prepared to hold that the trustees can exercise the power of maintenance during minority conferred by s. 43 of the Conveyancing Act, 1881.]

Pepys, for persons entitled in remainder. The undistributed income now in the hands of the trustees ought to be accumulated under the trust for accumulation. The circumstances are no doubt peculiar, but the mere fact that the lady was left without income during the interval between the date of her marriage and the date when she attained the age of twenty-one years does not prevent the trust for accumulation from attaching to the past income. When this income reached the hands of the trustees the discretionary power of maintenance under the will was no longer exercisable and the trust to accumulate was alone in existence. The power conferred by s. 43 of the Conveyancing Act, 1881, is not applicable to the present case, since the trust for accumulation shews a "contrary intention" within the meaning of s. 43, sub-s. 3, excluding the Act. The decision of Pearson J. in *In re Thatcher's Trusts* (2) is distinguishable, since in that case the accumulations became the absolute property of the legatee, while in the present case they are settled. *In re Humphreys* (3) is not in point. *In re Wise* (1) is distinguishable as in that case no part of the income had ever been applied for maintenance. In any case the maintenance out of this income cannot be continued after the lady attained the age of twenty-one

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absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

"(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

(1) [1896] 1 Ch. 281; 73 L. T. 743.
(2) 26 Ch. D. 426.
(3) [1893] 3 Ch. 1.

years. The order of North J. in *In re Wise* (1) does not bear the wide construction which is sought to be placed on it.

Byrne, for the testator's widow.

FARWELL L.J. This case raises a curious point and one which is not likely often to recur because the difficulty mainly arises from the fact that the chief part of the testator's estate is in Australia. The testator died in 1909; he left two daughters and he divided his estate in effect between the two daughters and settled a moiety on each daughter for life with remainder to her issue. The will contains a maintenance clause, in the following terms. [His Lordship read the clause, and proceeded:] The daughter in the present case was married on June 12, 1912, and attained the age of twenty-one years on October 1 in the same year. There is therefore a period between June and October, 1912, when she was a married woman and also an infant, and on the construction of the maintenance clause in this will it is contended that the power does not extend beyond the date of her marriage, when she became entitled, although an infant, to the income of her moiety of the estate. Assuming this to be so the question then arises whether the maintenance clause in the Conveyancing Act, 1881, which in terms extends during infancy irrespective of marriage, is applicable, in which case a discretionary power of maintenance is exercisable by the trustees for the period between the date of the marriage and the date when the daughter attained the age of twenty-one years. The facts which give rise to the difficulty in the present case are thus stated in the following passage in the evidence which I will read: "The said residuary estate of the said testator consists to a large extent of real estate in New South Wales which the trustees are realising from time to time as opportunities occur. Considerable sums are also received by the trustees in Australia in respect of interest on purchase-moneys and on mortgages. The annual estate accounts are made up as regards Australian income to the 31st March while the general account is made up to the 13th June. The Australian accounts to 31st March include rents up to the previous 31st

(1) [1896] 1 Ch. 281; 73 L. T. 743.

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December and interest as aforesaid up to various dates between the 1st of January and 31st March." The result is that there was a very considerable portion of the income in arrear at the date when the lady became a married woman, and the question is whether the trustees have power to provide for her maintenance during the period between the date of her marriage and the date of her attaining the age of twenty-one years, on the footing that she was still an infant. I am not concerned with the question whether they ought or ought not to do so, but only with the question whether they have power to do so, and that depends on whether s. 43 of the Conveyancing Act, 1881, applies to the case, and according to the terms of the section it does apply unless the will shews a "contrary intention." There is very little authority on the point, but in *In re Thatcher's Trusts* (1), where a testator gave a fund to trustees for all the children of A. equally, who being sons should attain twenty-one or being daughters should attain twenty-one or marry, with benefit of survivorship amongst them, and directed his trustees to accumulate the income of the shares of the children, and to pay the same to them as and when their presumptive shares should become payable under the previous trust, Pearson J. decided that the will did not express a "contrary intention" within the meaning of s. 43 of the Conveyancing Act, 1881, and that the children being infants and unmarried the trustees might at their discretion apply the income of the trust fund in or towards the maintenance and education of the infants. That decision is in my opinion an authority which applies to the present case. There are no negative words in the present case; there is no expressed intention to exclude the Act, which if it is excluded, is excluded by inference only, and I see no reason why the generality of the power which the Legislature has thought fit to confer for the maintenance of infants should be limited on the mere ground that the testator has inserted in his will the particular power which I have read. I repeat that the trustees are not bound to exercise the statutory power, but in my opinion they are entitled to exercise it if they think fit.

With regard to the decision of North J. in *In re Wise* (2), upon

(1) 26 Ch. D. 426.

(2) [1896] 1 Ch. 281; 73 L. T. 743.

which Mr. Farwell founded a claim for a much larger amount, I do not think that the learned judge intended in that case to decide that the children were entitled to maintenance out of income during any period after they attained the age of twenty-three years, which was the limit of time fixed by the will in that case. The words of the order as stated in the report contained a declaration that the trustees might apply the income and the accumulations thereof "in or towards the maintenance, etc. (following words of will)," and the words of the will in that case were "for the benefit of the child or children of Margaret Hine Jackson until they should respectively attain the age of twenty-three years." I think it is plain that the expression "etc." in the order was intended to include those words, and that the learned judge had no intention of resettling the will so as to strike out the limitation of time during which the legatees were entitled to maintenance.

I will make a declaration accordingly to the effect that under s. 43 of the Conveyancing Act, 1881, the trustees have power to apply income accruing due prior to the date of her marriage for the maintenance of Viscountess Northland between the date of her marriage and the date when she attained the age of twenty-one years.

Solicitors: *Mackrell, Maton, Godlee & Quincey.*

A. C.

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Jan. 31;
Feb. 3, 10.

In re BLOW.

GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL *v.* CAMBDEN.

[1911 B. 3854.]

Administration—Creditor's Action—Representatives of Deceased Executor—Devastavit—Payment to Beneficiaries more than Six Years before Action—Statute of Limitations—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 1, *sub-s.* 3; *s.* 8.

The principle stated in *In re Hyatt* (1888) 38 Ch. D. 609, namely, that in taking an account at the suit of a creditor the executors cannot set up their own devastavit so as to obtain the benefit of the Statute of Limitations, and that therefore payments made by the executors to beneficiaries will be disallowed though made more than six years before action, has not been altered by s. 8 of the Trustee Act, 1888.

Dictum of Fletcher Moulton L.J. in *Lacons* v. *Warmoll* [1907] 2 K. B. 350, 364, dissented from.

In re Croyden (1911) 55 Sol. J. 632, distinguished.

Trial of Action.

This action was brought for the administration of the estate of Samuel Blow. On August 10, 1893, the plaintiffs granted to him seven separate leases of properties known collectively as the Peerless Pool Estate. Each lease contained a covenant for payment of the rent. Samuel Blow died on January 8, 1902, leaving a will and codicils under which the defendant William Cambden and Frederick Dawkins were executors. The Peerless Pool Estate was specifically bequeathed to his wife for life and after her death to his children. The residue was bequeathed to his wife and children in certain shares. The estate was considerable. At the time of the testator's death, and for some years afterwards, the rack rents of the Peerless Pool Estate were more than sufficient to pay the plaintiffs their rent, and the rent was in fact paid until 1908, and further payments were made under stress of proceedings in 1909. The rent then fell again into arrear, and the writ in this action was issued on November 20, 1911.

Meanwhile in October, 1902, the executors distributed the estate amongst the beneficiaries, taking from them a covenant

to indemnify the executors against claims under the lease, but not otherwise providing for satisfaction of those claims. Frederick Dawkins died on September 7, 1906, his executors being Sarah Ann Dawkins, Ambrose Augustus Whitehead, and William Stewart Lane. The defendants to the writ as originally issued were William Cambden, the surviving executor, and the beneficiaries. The relief claimed was as follows: "That the estate of the late Samuel Blow, of whose will and codicil the defendant William Cambden is executor, may be administered by the Court so far as the same is not already being so administered under an order of Mr. Justice Parker dated July 27, 1911 (which related to the Peerless Pool Estate alone), and that, so far as may be necessary to satisfy all claims of the plaintiff, the defendant William Cambden may be declared and made liable for having distributed among the other defendants portions of the testator's estate, and that he may be required to enforce his rights of indemnity against them, and they may be ordered to refund the amounts received by them," and incidental relief.

Pleadings were delivered, and the action came on for trial before Warrington J. on July 11, 1912, when judgment was pronounced for accounts and inquiries in the form usual in actions by unpaid creditors where the estate or part of it has been paid to beneficiaries. It was then pointed out that to make the account complete the representatives of Frederick Dawkins ought to be parties. This view was accepted. The writ was amended on July 31, 1912, by adding Messrs. Whitehead and Lane as defendants, Mrs. Dawkins being already a defendant as a beneficiary. They duly appeared and put in a defence, and the action was restored to the paper and now came on for trial.

The defendants pleaded the Trustee Act, 1888, s. 8, and insisted that the payments made to beneficiaries must be allowed as having been made more than six years before the commencement of the proceedings.

Cave, K.C., and *E. Beaumont*, for the plaintiffs. The case is covered by *In re Hyatt* (1), which is a direct authority to shew that an executor cannot set up a devastavit in order to obtain

(1) 38 Ch. D. 609.

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the benefit of the Statute of Limitations. That decision is not affected by s. 8 of the Trustee Act, 1888.

[WARRINGTON J. I think that the onus is on persons who claim the benefit of the statute.]

Clauson, K.C., J. S. Green, and *H. S. Howard*, for Sarah Ann Dawkins. Apart from s. 8 of the Trustee Act, 1888, the decisions of Chitty J. in *In re Hyatt* (1) and of Kay J. in *In re Marsden* (2) would, no doubt, be conclusive in favour of the plaintiffs; but that enactment has altered the previous law and enables an executor, or his personal representatives, to plead the lapse of six years as a good defence to an honest though mistaken distribution or payment. Sect. 1, sub-s. 3, which provides that the term "trustee" in the Act shall include an "executor," and s. 8, sub-s. 1 (*a*) and (*b*), are the material sections. (3) The estate of the deceased executor can only

(1) 38 Ch. D. 609.

(2) (1884) 26 Ch. D. 783.

(3) Trustee Act, 1888, s. 1, sub-s. 3, provides: "For the purposes of this Act the expression 'trustee' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds."

Sect. 8, sub-s. 1, provides: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

"(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary un-

be affected by way of equitable relief; and the effect of s. 8 is that the representatives of the deceased executor are entitled to the same protection as if disregarding their fiduciary position the action had been brought against them at law. The Statute of Limitations applicable to devastavit is 21 Jac. 1, c. 16, which bars the action after the lapse of six years, and according to the wording of s. 8 the case falls within each sub-section (*a*) and (*b*). The dictum of Fletcher Moulton L.J. in *Lacons* v. *Warmoll* (1) is in our favour, where he said, "as at present advised, I am of opinion that (at all events since the passing of the Trustee Act, 1888) the liability of an executor in respect of moneys honestly paid away by him, as in this case, is barred at the expiry of six years from the date of the payment, whatever be the form of the proceedings by which it is sought to enforce the liability." The decision of Eve J. in *In re Croyden* (2) is also an authority in our favour. It is true that in that case the action was brought by a beneficiary who could have sued in respect of her share of the residuary estate immediately on the testator's death, but it has never been decided that a creditor cannot bring an action on a devastavit even though his debt is not in arrear, though he may not be able either to bring an action or issue a summons under Order LV., r. 3, for administration—*In re Hargreaves* (3)—or to insist on a fund being set apart to answer his contingent debt: *King* v. *Malcott.* (4) The account, therefore, should be limited to moneys received by the deceased executor six years before the commencement of proceedings as in *How* v. *Earl Winterton* (5) and *In re Davies.* (6)

J. M. Gover, for the executors of Frederick Dawkins other than Sarah Ann Dawkins, supported the same argument and further submitted that in any case it was a case for relief under s. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), the executors having acted honestly and reasonably in distributing the estate as they did.

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less and until the interest of such beneficiary shall be an interest in possession."

(1) [1907] 2 K. B. 350, 364.
(2) 55 Sol. J. 632.
(3) (1890) 44 Ch. D. 236.
(4) (1852) 9 Hare, 692.
(5) [1896] 2 Ch. 626.
(6) [1898] 2 Ch. 142.

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[WARRINGTON J. I am not going into that question on the present hearing.]

H. Terrell, K.C., and *J. G. Wood*, for Cambden.

R. Wright Taylor, for other parties.

Cave, K.C., in reply. If the argument for the defendants is right, the result is singular since the claim, which did not accrue till quite recently, is now statute-barred against these defendants, though the plaintiffs were unable to sue at any earlier date either on the covenants in the leases or for administration or even on a devastavit: see per Turner V.-C. in *King* v. *Malcott*. (1)

[WARRINGTON J. Buckley L.J. in *Lacons* v. *Warmoll* (2) seems to have thought that a contingent creditor might sue on a devastavit.]

Gale v. *Luttrell* (3) and *Holland* v. *Prior* (4) shew the position of the personal representatives of a deceased executor as accounting parties, and there is no authority for the proposition that they can plead the Trustee Act, 1888, s. 8, at the suit of a creditor claiming an account. *Lacons* v. *Warmoll* (5) was an action founded on a devastavit, and the dictum of Fletcher Moulton L.J., if applicable to the present proceedings, is expressed too widely. The present action is for the usual accounts, and the rule that an executor will not be allowed to set up his own devastavit in answer to such an action is applicable as well after as before the Trustee Act, 1888. The devastavit is not the cause of action, nor is this action an action to "recover money," and neither sub-s. (*a*) nor sub-s. (*b*) applies to such a case. *In re Croyden* (6) is distinguishable on the ground that the action was brought by a beneficiary and not by a creditor.

[Carson's Real Property Statutes, 2nd ed. pp. 221, 243—245; Williams on Executors, 10th ed. pp. 1599, 1605; *Knatchbull* v. *Fearnhead* (7), and *Thorne* v. *Kerr* (8) were also referred to.]

Cur. adv. vult.

(1) 9 Hare, 697.
(2) [1907] 2 K. B. 366.
(3) (1824) 2 Add. 234.
(4) (1834) 1 My. & K. 237.
(5) [1907] 2 K. B. 350.
(6) 55 Sol. J. 632.
(7) (1837) 3 My. & Cr. 122.
(8) (1855) 2 K. & J. 54.

Feb. 10. WARRINGTON J. delivered a considered judgment in which he stated the facts as above set out, and continued: The representatives of Frederick Dawkins have pleaded the Trustee Act, 1888, and insist that all payments to beneficiaries made before July 31, 1906, must be allowed as having been made more than six years before the commencement of the proceedings against them.

The defendant Cambden, the surviving executor, raises the same defence, but it is of no importance to him, as he is in any case liable to the rent as assignee of the lease.

Ought the account to be limited in the way contended for?

If the defendants' contention is well founded it would result in this, that in every creditors' administration action begun more than six years from the death the executors would be entitled to be allowed every payment made more than six years before action, in the absence, of course, of fraud. The change in practice would be a startling one, and it is remarkable that no instance of an account in a creditors' action being so limited has been cited, although the Act of 1888 has been in operation since January 1, 1890, namely, twenty-three years. Still, the defendants may be right and the matter may until now have been overlooked.

As to the position before the Act, it is quite clear that, in taking an account against executors at the suit of a creditor, payments made to beneficiaries would be disallowed, though made more than six years before action: *In re Hyatt.* (1) The question is, Has the rule there laid down been altered by the statute? The material parts of the statute are as follows: [His Lordship read s. 1, sub-s. 3, and s. 8, sub-s. 1, and continued:]

I will consider the question first without reference to authority. Reading, as I must do, the word "trustee" in s. 8 as including an executor, the action before me is an action against a trustee, and therefore the provisions of the section are to have effect, but those provisions may be of such a nature as to be inapplicable to a particular kind of action, and in such case there would be no provision capable of taking effect.

For the purpose of determining whether this is so in the

(1) 38 Ch. D. 609.

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present case it is necessary to see what is the nature and object of the action.

It is an action by a creditor of the deceased, founded on his, the deceased's, contract, and not on any contract of the defendant, the surviving executor, or of the deceased executor. Its object is to have the estate of the deceased ascertained and got in and properly applied in a due course of administration, including the payment of the debts of the plaintiffs and the other creditors. The surviving executor is made a defendant as the person now representing the estate and as being accountable for so much of the estate as was received by him. The representatives of the deceased executor are made parties in order that an account may be taken of the estate received by him either alone or jointly with his co-executor, and that so complete justice may be done both to the plaintiff and to the surviving executor: *Holland* v. *Prior*. (1)

Incidentally the result may be, as in the present case, that the executors may have to pay, not to the plaintiff, but into Court for application in a due course of administration, moneys already paid away by them otherwise than in such due course. But such payment is not in these cases the cause of action; in fact, it cannot be a cause of action except an action for a devastavit, with which I have not now to deal. It is not a breach of trust, the obligation of the executor being not an equitable but a legal obligation, and trusts being the creatures of equity: per Chitty J. in *In re Hyatt*. (2) Moreover, in the present case the payment is not one which could at the time have been prevented by the plaintiffs by an action for administration: *King* v. *Malcott*. (3)

I now turn to the Trustee Act to see whether the provisions set out in s. 8 are applicable to such an action. The material provisions are contained in sub-clauses (*a*) and (*b*). Sub-clause (*a*) is clearly inapplicable. If the defendants can set up any existing Statute of Limitations, it is the Statute of James I. so far as it is a bar to an action of devastavit. But this is not such an action, nor, if it were, would the enjoyment of the privileges of the statute be dependent on the defendant not being a trustee;

(1) 1 My. & K. 237. (2) 38 Ch. D. 617.
(3) 9 Hare, 692.

on the contrary, the action of devastavit is founded on the fact that he is an executor, and therefore, for the purposes of the Act I am construing, a trustee. Then is it an action brought to recover money? I do not think it is; it is brought to obtain administration in the course of which money may be payable to the plaintiff, but in my opinion this is not on the true construction of the Act what is meant by an action to recover money. In fact, the plaintiffs may succeed in obtaining payment of their debt in full without requiring the defendants to pay a single penny.

But, if I am wrong, at all events the money which it is sought to recover is the debt owing to the plaintiff, and is, therefore, not one to which no existing Statute of Limitations applies, inasmuch as the statute applicable to the plaintiff's debt would apply, and his claim would be barred if the necessary time had elapsed. In the absence of authority, therefore, I should be prepared to hold that the principles on which the judgment in *In re Hyatt* (1) is founded are still in force, and that the contention resting on the Trustee Act, 1888, fails.

But there is some authority which it is necessary to consider. In *Lacons* v. *Wormall* (2) Fletcher Moulton L.J. said this: "For the reasons I have given I think it unnecessary to decide the question whether by some other form of procedure the plaintiffs could have prevented the defendant from obtaining the benefit of the Statute of Limitations, a question which no doubt is raised by the remarks of Chitty J. in the above-mentioned case of *In re Hyatt*. (1) But I ought to add that, as at present advised, I am of opinion that (at all events since the passing of the Trustee Act, 1888) the liability of an executor in respect of moneys honestly paid away by him, as in this case, is barred at the expiry of six years from the date of the payment, whatever be the form of the proceedings by which it is sought to enforce the liability."

The other members of the Court, the Lord Chief Justice and Buckley L.J., abstained from expressing any opinion on the point, nor can I see from the report that there was any serious argument upon it. The question did not arise, as the action was

(1) 38 Ch. D. 617. (2) [1907] 2 K. B. 350, 364.

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for devastavit, to which undoubtedly the statute of James I. applies. The learned Lord Justice himself uses the expression "as at present advised," suggesting the possibility that further argument might induce him to alter his opinion. I think I may without disrespect express my disagreement.

There is, however, one decision of which a note is to be found in 55 *Solicitors' Journal*, 632. It is a decision of Eve J. in *In re Croyden*. The learned judge there declined to enforce against the estate of a deceased executor and trustee a claim to money paid away more than six years before action. But that was a beneficiaries' action, to which very different considerations apply. I hold, therefore, that the account with its ancillary directions must be in the usual form.

Solicitors: *Wilde, Moore, Wigston & Co.; Chalton Hubbard; Carter & Carter; Taylor & Bryden*; *E. V. Huxtable; Mills, Curry & Gaskell.*

A. C.

NEVILLE J.
1913
Jan. 28, 29.

PARR *v.* LANCASHIRE AND CHESHIRE MINERS' FEDERATION.

[1910 P. 1225.]

Trade Union—Rules—Parliamentary Levies—Expulsion of Member—Ultra vires—Injunction—Unregistered Association—Parties—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *ss.* 4, 6, 13—*Trade Union Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 8—*Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4.

The Trade Union Act, 1871, s. 6, which declares that if any one of the purposes of a registered trade union is unlawful the registration shall be void, and s. 13, which provides that the certificate of registration, unless withdrawn or cancelled, shall be conclusive evidence that the regulations of the Act have been complied with, must be read with the Trade Union Act, 1876, s. 8, which empowers the Registrar of Friendly Societies to withdraw or cancel the certificate of registration of a trade union on proof "that the registration of the trade union has become void under section 6 of the Trade Union Act, 1871." Where, therefore, any of the purposes of a registered trade union are ultra vires it can properly be sued in its registered name until its certificate of registration has been withdrawn or cancelled by the registrar.

The committee of a trade union passed a resolution purporting to expel one of its members from the union. To an action by the member

to restrain the union and its officers from wrongfully expelling him from the union the defendants pleaded that the action was not maintainable because the expulsion was a tortious act done in furtherance of a trade dispute within s. 4 of the Trade Disputes Act, 1906:—

Held, that s. 4 of the Trade Disputes Act, 1906, did not apply to the case of a plaintiff suing in respect of a breach of his contractual rights under the rules of the union.

An unregistered association consisted of numerous trade unions and their members. One of its objects, as defined by its rules, was illegal. Under its rules it had a president, vice-president, treasurer and secretary, and its affairs were managed by an executive committee and its funds were vested in trustees. In an action by a member to restrain the application of the funds of the association to illegal purposes the president, vice-president, treasurer, and secretary were made defendants and objected that they did not represent the association, and that the plaintiff should have sued the executive committee and the trustees:—

Held, that the defendant officials sufficiently represented the association for the purposes of the action.

ACTION.

The plaintiff was a member of the Havannah and Southport Branch of Miners, Parr (hereafter called the defendant branch union), and by virtue thereof was also a member of the Lancashire and Cheshire Miners' Federation and of the Miners' Federation of Great Britain.

The Lancashire and Cheshire Miners' Federation (hereafter called the defendant federation) was a trade union established in 1899 and registered under the Trade Union Acts, 1871 and 1876. The defendant federation was composed of branches established in various districts of the United Kingdom, and one of its branches was the defendant branch union, which was also a trade union registered under the Trade Union Acts. The rules of the defendant federation, after providing (inter alia) for the establishment of branches consisting of one or more collieries, and that every branch of the defendant federation should be bound by the rules, provided by rule 30 (B) that "each member shall pay one penny per month to a parliamentary fund which the treasurer shall pay over to the levies made under the parliamentary scheme of the Miners' Federation of Great Britain and of the Labour party for the promotion of Labour representatives in the House of Commons."

The Miners' Federation of Great Britain (hereafter called the

NEVILLE J. 1913 PARR v. LANCASHIRE AND CHESHIRE MINERS' FEDERATION.

Miners' Federation) was an unregistered association consisting of a combination or amalgamation of numerous trade unions, one of which was the defendant federation. Its objects as defined by its rules were (inter alia) to protect miners generally and to seek to secure mining legislation, and in particular, rule 2 (8.), "To provide funds to pay for the election expenses of Labour candidates and support members who may be returned to the House of Commons." It had a president, vice-president, treasurer, and secretary, and its affairs were managed by an executive committee of not less than twelve members, exclusive of officers, and all committee meetings were to be called by the president and secretary; and its funds were vested in trustees.

There was nothing obnoxious in the rules of the defendant branch union, which provided (1.) that it should form a branch of the defendant federation; (2.) that it should be conducted under pure, sincere union principles, and that none of its funds or property should be appropriated to any use other than those provided by its rules; and (19.) that "Should any member bring a charge against another, and the same be proved false, such member shall be fined one shilling for the same, and should any member refuse or neglect to pay this fine, he shall be summoned to the next branch meeting, which shall decide what steps to take for his suspension or expulsion, when their decision shall be final."

The plaintiff, who was a member of the committee of the defendant branch union, issued the writ in this action in June, 1910, against the defendant federation and its trustees, the defendant branch union and its trustees, and against the president (since deceased), the vice-president, the treasurer, and secretary of the Miners' Federation. The plaintiff by his statement of claim alleged that he was a member of the three defendant associations; that the objects of the Miners' Federation were illegal and ultra vires; that the defendant branch union had paid out of the contributions of its members sums to the parliamentary fund of the defendant federation; that that federation had in turn made payments out of its contributions to the funds of the Miners' Federation, who had applied the same for its objects above stated; that all such payments were illegal and

void; that rule 30 (B) of the defendant federation and rule 2 (8.) of the Miners' Federation were ultra vires; that the defendant branch union was threatening to expel him from membership; and he claimed declarations accordingly and injunctions.

The defendant branch union and their trustees by their defence did not admit any payment out of their funds for parliamentary purposes; they alleged that at a meeting of the defendant branch union duly convened and held on September 21, 1910, the plaintiff was expelled from membership of their union; and they relied on the provisions of the Trade Union Acts, 1871 to 1906.

The defendant federation and their trustees by their defence did not admit the application of their funds to parliamentary purposes, and alleged that the plaintiff, on his expulsion in September, 1910, from the defendant branch union, ceased to be a member of the defendant federation; that the defendant federation consisted of a number of branches, each having its own officials, and appointed committees and delegates to confer with committees and delegates of other societies, and was therefore an unlawful combination under the Acts 39 Geo. 3, c. 79, and 57 Geo. 3, c. 19. They also submitted that the defendant federation was an unlawful combination at common law and relied on s. 4 of the Trade Union Act, 1871; and that if any of the rules or objects of the defendant federation were illegal the registration of the defendant federation under the Trade Union Acts was void, and it could not be sued as a registered society.

The defendant officials of the Miners' Federation by their defence alleged that the plaintiff, on his expulsion from the defendant branch union, ceased to be a member of the Miners' Federation, and did not admit the receipt of funds from the defendant federation and the defendant branch union for parliamentary purposes. They also raised the same defences under s. 4 of the Trade Union Act, 1871, and the Acts 39 Geo. 3, c. 79, and 57 Geo. 3, c. 19, and submitted that they were improperly sued on behalf of the trustees and all other members of the Miners' Federation.

Spencer Bower, *K.C.*, and *Stuart Bevan*, for the plaintiff. It is clear on the evidence that the funds of all the three defendant

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associations have been applied for parliamentary purposes, and that such application of their funds and rule 30 (B) of the defendant federation and rule 2 (8.) of the Miners' Federation are illegal and ultra vires: *Amalgamated Society of Railway Servants* v. *Osborne.* (1) As to the expulsion of the plaintiff because he used the accounts and balance-sheets of the defendant federation and the defendant branch union for the purposes of the interlocutory injunction he obtained in July, 1910, he was called a traitor, and at a meeting of the committee of the defendant branch union held on September 21, at which he was not present, a resolution was passed purporting to expel him from the union. Then at a general meeting of the defendant branch union held on October 14, 1910, the question of expelling the plaintiff was discussed and the decision of the committee was upheld. This was done without notification of any charge made against him and without giving him any opportunity to be heard. The defendant branch union had no inherent power to expel a member except under its rules, and rule 19 does not apply. Therefore the attempted expulsion of the plaintiff was illegal and contrary to natural justice: *Osborne* v. *Amalgamated Society of Railway Servants* (2); *Luby* v. *Warwickshire Miners' Association.* (3) The defences raised under s. 4 of the Trade Union Act, 1871, are concluded by the decision in *Osborne* v. *Amalgamated Society of Railway Servants* (2); and *Luby* v. *Warwickshire Miners' Association* (3) disposes of the points raised under the Acts of George III. Lastly, the defendant officials of the Miners' Federation sufficiently represent that association.

Jenkins, K.C., and *Courthope Wilson*, for the defendant branch union. It is admitted that we cannot argue here the points decided in the cases cited. But with regard to the expulsion of the plaintiff there is a further point which has not been previously raised. First, we say that the plaintiff is not suing in respect of a breach of contract, but in respect of a tortious act done in furtherance of a trade dispute within the meaning of s. 4 of the Trade Disputes Act, 1906, which Act (s. 5) is to be read as one with the Trade Union Acts, 1871—1876, and therefore the

(1) [1910] A. C. 87. (2) [1911] 1 Ch. 540.
(3) [1912] 2 Ch. 371

action is not maintainable: *Vacher & Sons, Ld.* v. *London Society of Compositors.* (1) Secondly, assuming the plaintiff is suing in respect of a breach of contract, it is submitted that the Court will not under the circumstances force the plaintiff as a member on the defendant branch union by injunction, even if the union are not within their rights in saying he is not to come. We admit there is no express or implied rule as to expulsion, but we submit that the plaintiff abused his position as a member of the committee, the governing body, by using information communicated to him as a committeeman about the affairs of the union for the purpose of assisting those who were attacking the union and its methods. It is suggested that in fairness he ought to sever himself from the union.

Peterson, K.C., and *T. C. Eastwood*, for the remaining defendants. In case this action goes further, we do not abandon the question under s. 4 of the Trade Union Act, 1871, decided in *Osborne* v. *Amalgamated Society of Railway Servants* (2), nor the question under the two Acts of George III. decided in *Luby* v. *Warwickshire Miners' Association.* (3) But additional points as to parties arise here. First, as regards the Miners' Federation. According to its rules it is an unregistered body consisting not of individual members but of federations and districts throughout the country. It has a president, vice-president, treasurer, and secretary, and also three trustees, and the management of its affairs and the control of its funds are in the hands of an executive committee. The defendant officials are not the trustees and it is submitted do not properly represent the Miners' Federation. The plaintiff should have sued the executive committee and the trustees: *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants.* (4) Then as to the defendant federation, the question is whether, assuming they have an unlawful object, they are capable of being sued in their registered name having regard to the fact that s. 6 of the Trade Union Act, 1871, expressly declares that "if any one of the purposes of such trade union be unlawful such registration shall be void." Sect. 13 of the same Act prescribes the regulations for registering a trade union and its rules, and provides that the

(1) [1912] 3 K. B. 547.
(2) [1911] 1 Ch. 540.
(3) [1912] 2 Ch. 371.
(4) [1901] A. C. 426, 437, 438.

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certificate of registration, unless cancelled or withdrawn, shall be conclusive evidence that the regulations of the Act have been complied with, and s. 8 of the Trade Union Act, 1876, provides for the cancellation of the certificate of registration by the registrar on being satisfied (inter alia) " that the registration of the trade union has become void under section 6 of the Act of 1871." It is submitted that s. 8 of the Act of 1876 is ministerial and only prescribes the machinery for cancelling a certificate and leaves untouched the express provision of s. 6 of the Act of 1871. Therefore, the registration of the defendant federation being void, it cannot be sued in its registered name, but must be sued by proper representatives, representing its executive, as pointed out in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants.* (1)

Spencer Bower, K.C., in reply. First, with regard to Mr. Jenkins' argument. This is not an action for a tort within the meaning of s. 4 of the Trade Disputes Act, 1906, but for a breach of contract. The plaintiff is suing in respect of his contractual rights under the rules. The distinction between a tort and a breach of contract is pointed out in Pollock on Torts, 9th ed. ch. I., passim.

[He was stopped.]

NEVILLE J. This action raises questions which undoubtedly are of importance, but not of such importance to-day as they were some time ago when the burden of maintaining parliamentary representatives was not undertaken by the State ; but of course expenditure of the funds of trade unions may still be illegal in consequence of their being applied to political purposes and not to the objects of the trade unions. The main points brought before me in the present action have already received judicial decision, upon which I need not enlarge and which of course I shall follow.

The two main points are, first, whether it is legal for trade unions such as these defendants to apply their funds for the support of parliamentary representatives or for political purposes ; and secondly, whether such trade unions have a

(1) [1901] A. C. 426, 436.

power of expulsion of their members, and, if they have such a power, whether that power has to be exercised in accordance with the known principles of law where such powers exist. Both those points have been decided before, and I can only repeat that in my opinion the applications of the funds to which my attention has been called in the present case, by the defendant branch union through the medium of the defendant federation, and by them and through them to the Miners' Federation, were illegal and ultra vires payments.

With regard to the question of expulsion, I find no power of expulsion to exist; but, if it did exist, it is quite clear that the circumstances under which it was purported to be exercised in the present case deprive the action of the union of all validity. The expelled member had no opportunity of being heard in his defence, the resolution for expulsion was passed behind his back, and, however complete the power of expulsion might have been, there is no pretence here of its having been properly exercised. In this connection some arguments on behalf of the defendant branch union did not at all meet with either my sympathy or approval. It is suggested that the Court would be doing wrong by granting an injunction restraining the members of the association from expelling the plaintiff because of the impropriety of his conduct and the just abhorrence in which it is suggested he must be held by all the other members of the association. I confess I do not in the least follow such an argument. Every member of a trade union has a right to see that the funds towards which he is a contributor are not illegally disposed of. He not only has that right, but to me it seems that he has a duty, although of imperfect obligation, to see that the body to which he belongs is not engaged knowingly in an illegal transaction; and when he is called "a traitor," his traitorous conduct simply consists in upholding the right and refusing to be a party to the wrong, and I see no reasonable ground of difference between the present plaintiff and the other members of the association except this, that whereas some of them desired to act illegally, he desired that the funds of the association should be legally applied. Then it is said, "Oh, but he shewed the balance-sheets and accounts of the various associations of which he was directly or indirectly a member to

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those who were assisting him in the litigation that he was engaged in." There, first of all, I do not think there was any indication on the balance-sheets themselves that they were confidential; but, if they were, the confidence did not extend to prohibit a member who was engaged in or desirous of asserting his legal rights from making such use of the documents as was necessary to enable him to lay the proper evidence before the Court to shew the facts upon which he relied to prove an illegal application of the funds. I, therefore, pass by entirely, except to express my disapproval of, the reflections which have been made upon the plaintiff.

The next question is this. It is suggested that in the previous decisions s. 4 of the Trade Disputes Act, 1906, had been overlooked, and consequently I was urged to come to a conclusion differing from those decisions, because this point had not been brought before the Court. I do not accept the view that s. 4 of the Act of 1906 was not both in the mind of the Court and in the mind of the counsel who argued the previous cases. I think it was not set up as a defence to those actions because it was inapplicable, and I have no doubt that that section does not apply to either of the matters with which I have to deal, namely, the misapplication of the funds, which is an ultra vires act under the constitution of the trade union, and the expulsion of the member, which is not a tortious act in my opinion, in the sense in which that word is used in the section, at all, but is founded upon a breach of the contractual obligations that exist between the plaintiff and the other members of the association. I think therefore that the defendant branch union's case is not strengthened by the reference to s. 4 of the Act of 1906.

That leaves only the question whether the defendant federation and the Miners' Federation are rightly sued. First of all it is said with regard to the defendant federation that although they are a registered union, still, inasmuch as one of their objects was the illegal application of their funds, that registration became void, and they are incapable of being sued as a registered association. I do not think that argument a sound one. To my mind s. 8 of the Act of 1876, coupled with the provision as to

the conclusive nature of the certificate of registration in the Act of 1871, shews clearly that that registration holds and can be relied upon unless and until it is withdrawn or cancelled in the manner provided for by s. 8 of the Act of 1876, which includes in the grounds for cancelling the certificate the ground relied upon here, namely, the existence of an illegal object of the association. I think therefore the defendant federation are properly sued in the present case.

Lastly, it is said that the Miners' Federation, which is an unregistered association and certainly one of a somewhat amorphous character, is not properly sued and is not sufficiently represented here by the officials who have been made defendants. I think the rule is well expressed by Lord Macnaghten in the case of *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1), where he says that an unregistered trade union "may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body." It appears to me here that the chief officials of the Miners' Federation who have been made defendants do fairly represent that body. I have not the least doubt from the arguments that have been addressed to me that the defendants who have been joined are acting on behalf of that association in the defences that they have raised here. It is said that the executive committee and the trustees were the proper defendants. What is wanted is a sufficient representation, and if the executive committee or if the trustees had desired to be added as defendants in this action, there is no question that upon application they could have been added as defendants, and that they were through their officers perfectly well advised of the case and put in a position in which they might have made such an application had they so wished, I feel no doubt whatever. I think, therefore, that objection also fails.

In my judgment the plaintiff is entitled to the relief that is asked for, and I grant the injunctions against the further misapplication of the funds of the various associations, and also an injunction restraining the defendant branch union from

(1) [1901] A. C. 426, 438.

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insisting upon the resolution expelling the plaintiff. I also think that the judgment ought to be prefaced with a declaration that rule 2 (8.) of the Miners' Federation and rule 30 (B) of the defendant federation are ultra vires.

Solicitor for plaintiff: *C. T. Wilkinson.*

Solicitors for defendants: *A. T. Plant, for W. Hutchen, St. Helens; J. Woodhouse, for T. Dootson, Leigh.*

H. L. F.

C. A. 1913 *Feb.* 11.

In re WATKINS. MAYBERY *v.* LIGHTFOOT.

[1910 W. 3068.]

Will—Construction—Realty—Devise—Life Estate—Remainder to "my nearest male heir"—"My nearest and eldest male relative"—No Male Heir—Heiress-at-Law—Intestacy.

The testator, a bachelor, devised real estate to a trustee and his heirs in trust to pay the rents and profits to H. H. M. for life and after his decease to convey, assign, and assure the same "unto my nearest male heir and should there be two or more in equal degrees of consanguinity to me then I direct the said" trustee "to convey assign and assure the same unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my eldest male relative." The testator bequeathed the residue of his personal estate to his trustee in trust for H. H. M. for life, expressing a desire that he should not mortgage or anticipate the same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value "and keeping up the remainder in trust for my nearest and eldest male relative" who should be such at the death of H. H. M.

The defendant Mrs. W. was the heiress-at-law of the testator both at his death and the death of H. H. M.

The nearest male relative of the testator at the time of his death was the son of a female first cousin, and at the time of H. H. M.'s death was the son of a daughter of the same cousin:—

Held, affirming the decision of Joyce J. [1912] 2 Ch. 430, that the devise failed and the testator's heiress-at-law was entitled.

APPEAL from a decision of Joyce J. (1)

This was a summons taken out for the purpose of determining the construction of an obscure and almost unintelligible will.

(1) [1912] 2 Ch. 430.

Joyce J. held that there was an intestacy and the testator's heiress-at-law was entitled.

David L. Le B. Lightfoot appealed.

C. A. 1913 WATKINS, *In re.* MAYBERY *v.* LIGHTFOOT.

Hughes, K.C., and *L. F. Potts*, for the appellant.
Younger, K.C., and *Harman*, for the heiress-at-law.
Tomlin, for the trustee.

The COURT (Cozens-Hardy M.R., Buckley and Hamilton L.JJ.; dissentiente Buckley L.J.) dismissed the appeal, though not on the grounds relied on by Joyce J. Their Lordships' judgments turned entirely on the construction of the will, and the case does not call for a detailed report.

Solicitors: *Sharpe, Pritchard & Co., for Jeffreys & Powell, Brecon, and J. B. G. Price, Neath; Davenport, Cunliffe & Blake, for Davenport & Rose, Oxford.*

H. C. R.

In re GENERAL MOTOR CAB COMPANY, LIMITED.

C. A. 1912 *April* 1.

[0066 of 1912.]

Company—Reconstruction—Compromise or Arrangement — Sale — Dissentient Shareholders—Power to bind—Petition—Sanction of the Court—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 120, 192.

A company proposed to sell its assets and undertaking to a new company to be formed for that purpose and to compel shareholders to accept shares in the new company instead of their shares in the old company. The creditors were to be taken over by the new company. There was no provision for preserving the rights of dissentient shareholders. On a petition for the sanction of the Court:—

Held (reversing the decision of Neville J.), that the scheme was not a compromise or arrangement which could be sanctioned under s. 120 of the Companies (Consolidation) Act, 1908.

APPEAL from a decision of Neville J.

The General Motor Cab Company, Limited, was incorporated in May, 1906, under the Companies Act, 1862, with a capital of 260,000*l.* divided into 257,000 preferred ordinary shares of 1*l.* each and 60,000 deferred shares of 1*s.* each. By clause 6 of the

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memorandum of association it was provided that the rights of members, subject to alterations made under powers given by the articles, should be that the net profits of the company should be applied in payment to the holders of preferred ordinary shares of a non-cumulative preferential dividend for the year of 7 per cent. on the amount paid up thereon; of the balance of profits 10 per cent. was to be carried to a reserve fund, and of the remainder one moiety was to belong to the holders of preferred ordinary shares and the residue to the owners of deferred shares; the net profits so divisible were to be divided amongst the holders of each class of shares pro rata, according to the number of shares held and the amount paid up thereon; in the event of the company being wound up the surplus assets after the return of the whole of the capital were to belong as to one half to the holders of preferred shares and as to the balance to the holders of deferred shares; new shares might from time to time be issued on such conditions as might be determined at a general meeting.

By resolutions of the company passed in December, 1906, and July, 1908, the capital was increased to 1,006,000*l.* divided into 1,000,000 preferred ordinary shares of 1*l.* each and 120,000 deferred shares of 1*s.* each; and by a resolution of January, 1909, the preferred shares were consolidated into 250,000 shares of 4*l.* each. The company issued debentures for 400,000*l.* (of which debentures for 266,640*l.* were outstanding) charged on the property of the company as a floating security. The company was said to have been unsuccessful and to require 600,000*l.* to pay interest on debentures and unsecured debts and to provide working capital; and it presented a petition for the sanction of the Court under the Companies (Consolidation) Act, 1908, to a scheme of arrangement.

By this scheme a new company was to be formed called the New Motor Cab Company, Limited, with a capital of 516,500*l.* divided into 125,000 cumulative preference shares of 4*l.* each, 220,000 non-cumulative preference shares of 1*s.* each, and 110,000 ordinary shares of 1*s.* each. The objects of the new company were to include the acquisition as a going concern of the undertaking, property, and assets of the old company, the

satisfaction of its debts and liabilities, and the carrying on of its business. The old company or its liquidators were to enter into an agreement with the new company for the sale to it of the property and undertaking of the old company (subject to the existing charges thereon) in consideration of the payment off of its debentures, the allotment to each holder of preferred shares in the old company of one fully-paid non-cumulative preference share of the new company for each fully-paid preference share of the old company held by him, and the allotment to each holder of deferred shares in the old company of one fully-paid ordinary share in the new company for every four fully-paid deferred shares of the old company held by him. Every shareholder of the old company would also have the right to subscribe at par for one cumulative preference share in the new company for every three shares held by him in the old company. The new company was to discharge all the liabilities of the old company and carry out its contracts. Each holder of preferred ordinary shares was to accept in discharge of all claims against the old company and its property one fully-paid non-cumulative preference share of the new company for every fully-paid preferred ordinary share of the present company; each holder of deferred shares was similarly to accept fully-paid ordinary shares. No provision was made for dissentient shareholders. Under an order made on February 16, 1912, meetings of (1.) the holders of preferred ordinary shares and (2.) the holders of deferred shares were held, and resolutions approving the scheme of arrangement were duly passed, at meeting (1.) by 280 shareholders holding 61,705 preferred shares against twelve shareholders holding 1401 preferred shares—and nine shareholders holding 219 preferred shares did not vote; and at meeting (2.) unanimously. At a meeting of the debenture-holders a resolution was passed accepting the terms offered by the scheme. No meetings of creditors were held.

The company presented a petition asking for the sanction of the Court to the scheme of arrangement so that it might be binding on the company and the preferred and deferred shareholders, and alleged that the scheme was fair, that it would release the shareholders from the debenture debt and the

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obligation of redeeming the debentures, and that it would provide the business with adequate working capital.

The preferred shareholders who had voted against the resolution at meeting (1.) opposed the application, but Neville J. sanctioned the scheme.

The dissentient shareholders appealed.

Martelli, K.C., and *Ward Coldridge*, for the appellants. This is not a compromise or arrangement within s. 120 of the Companies (Consolidation) Act, 1908, but a sale under s. 192, and it cannot be sanctioned without providing for the interests of dissentient shareholders. The scheme is entirely in favour of the deferred shareholders.

[They were stopped by the Court.]

H. E. Wright (*Gore-Browne, K.C.*, with him), for the company. The Court has power to sanction this scheme under s. 120, for that section authorizes the sanction of a sale. The memorandum of association contemplates the winding up of the company and the Court has general jurisdiction to sanction a sale: *In re Canning Jarrah Timber Co.* (*Western Australia*), *Ld.* (1), where the scheme was sanctioned under the general jurisdiction of the Court, not under s. 161 of the Companies Act, 1862, the equivalent of s. 192 of the Act of 1908. The Court can under the general jurisdiction sanction a sale in a compulsory winding-up: *In re English, Scottish and Australian Chartered Bank.* (2)

[He was not heard on the merits of the scheme.]

W. H. Cozens-Hardy, for a debenture-holder.

COZENS-HARDY M.R. This is an appeal from the order of Neville J. sanctioning a scheme of arrangement which is put forward under s. 120 of the Companies (Consolidation) Act, 1908. I regret to say that we have not any judgment of Neville J. dealing with the point upon which I think this case ought to be decided. I gather from what Mr. Martelli says that he stated his objections to the jurisdiction, but that the learned judge did not say why he did not agree with the argument, and, therefore, we must deal with the matter as best we can.

(1) [1900] 1 Ch. 708. (2) [1893] 3 Ch. 385.

The question to be determined is shortly this: Is this a scheme, the essence of which I will refer to in a minute, coming within s. 120 of the Companies (Consolidation) Act, 1908? That section says: "Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs." Then it provides in sub-s. 2 that if there is a certain majority specified in that sub-section in favour of the scheme, then "the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company." There is also in this same Act s. 192, a section which I am more familiar with as s. 161 of the Act of 1862, a section which contemplates in language which is perfectly clear what is to be done when it is proposed that the whole undertaking of the company shall be transferred to a new company. As matters now stand, s. 192 applies where a company is proposed to be or is in course of being wound up altogether voluntarily and the whole or part of its business or property is proposed to be transferred to the new company. Certain rights are given to dissentient shareholders; and they are protected as far as reasonably can be by s. 192.

Now, what is the scheme which the learned judge has been asked to sanction and has sanctioned? It is a scheme which provides that a new company is to be formed to which the whole undertaking of the existing company is to be sold and no provision whatever is made for dissentients. In my opinion this is an entire misunderstanding and misconception of the true meaning and effect of s. 120. We have had our attention called to no authority which justifies a matter being dealt with in this way,

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We were first of all referred to the case of *In re Canning Jarrah Timber Co. (Western Australia), Ld.* (1) That was an entirely different case to this. It came before me as judge of first instance, and I desire to adhere to the part of my judgment which alone is material to the present case. There was an objection to the underwriting which I thought fatal, and in the Court of Appeal that was got rid of by the underwriting agreements being withdrawn. "But," I then said, "I am asked to sanction a scheme of arrangement by way of reconstruction of the company whereby its assets and liabilities are to be transferred to a new company." (2) I thought that was not within the meaning of the arrangement section, the section corresponding to s. 120 of the new Act. I still think so; and there is nothing in the decision of the Court of Appeal contrary to that. There was, of course, a winding-up in that case, and Lord Lindley, then Master of the Rolls, says (3): "I think we must have regard to s. 161 of the Companies Act, 1862, as well as to the provisions of the Act of 1870. It is proposed to bind the contributories as well as the debenture-holders. I think s. 161 contemplates a sale to an existing company." Then he says: "If the liquidator is willing to undertake to pay the unsecured creditors in full," that is to say if all the creditors are got rid of, "and not to act upon the underwriting agreements, we will hear the respondents." Then, having got rid of the objection which I felt when it came before me, the liquidator accepting the following conditions, to pay all the unsecured creditors in full, not to act on the last resolution passed at the meeting of shareholders but to procure the underwriting agreements to be cancelled, the dissentient shareholders to have the right given to them which was conferred by ss. 161 and 162—on those terms the Court sanctioned it. But what relation has that to the present case? There is no arrangement with creditors in the present case, and no meeting of creditors has been held at all. It is simply a proposal, and nothing more, to compel the shareholders who are of different classes in this company to accept shares in a new company when there has been no order for sale of any kind and when, as it

(1) [1900] 1 Ch. 708. (2) [1900] 1 Ch. 713.
(3) [1900] 1 Ch. 715.

seems to me, there is no arrangement with the company or its shareholders or compromise between the shareholders and the company within the meaning of the section. If the parties want to carry out any scheme of this kind they must not proceed with it in this way.

I purposely abstain from saying anything about the terms and conditions of the scheme. It would not be right that I should say a word about that because Mr. Wright has not been heard on that point. I base my judgment simply upon the point that assuming the figures to be all right there is no jurisdiction, proceeding simply under s. 120, to compel the preference and ordinary shareholders of this company to take shares in an unformed new company however reasonable the terms of the arrangement might otherwise be. In my opinion this objection prevails and the order of Neville J. must be reversed.

BUCKLEY L.J. My difficulty in giving judgment in this case lies in seeking to grasp what is the proposition which was affirmed in the Court below. I confess myself quite unable to understand it. There is no note of the judgment of the learned judge, and no argument has been advanced which has convinced me that there is a possibility of affirming such a scheme as this.

The circumstances are most extraordinary. The figures are something of this kind. There is a company which, as far as appears, is a prosperous company with a nominal capital of 1,006,000*l.*, and a paid-up capital of 822,880*l.* 11*s.* This transaction is one under which its preferred fully-paid ordinary shares of 4*l.* are to be replaced by shares of 1*s.* and four of its fully-paid deferred shares of 1*s.* by a share of 1*s.* The result is that the 822,880*l.* 11*s.* is represented in the new company by a sum of not much more than 10,000*l.* That is startling, but we have not heard that out, and whether any excuse can be put forward for those figures I do not know. They leave me in astonishment. However that is what is proposed. There have been certain meetings called of the shareholders of this company, and I gather that there has been a meeting of debenture-holders called under a clause in the trust deed. The debenture-holders passed a resolution. There has been no meeting of other

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creditors and there is no compromise with creditors; the arrangement is that the creditors are to be provided for. There have been meetings of the contributories and it is said, and I take it to be the fact, that they have by the requisite majority approved this which is called a scheme of arrangement. It is said that the transaction is justified under s. 120 of the Companies (Consolidation) Act, 1908. That section uses two words—"compromise" and "arrangement." Compromise here there is none. "Arrangement," no doubt, is a larger word than "compromise," but "arrangement" I think in that section must mean something analogous in some sense to "compromise." What is proposed to be done under this scheme is not a compromise or arrangement at all, it is a sale for shares and a division of the proceeds of sale amongst these parties in a way as regards the figures which looks very strange but which I am not going to investigate. Another section of the Act of Parliament authorizes a sale for shares with proper safeguards in a winding-up which is not compulsory. (1) It has been decided over and over again that in a compulsory winding-up you can sell in like manner and the Court will introduce like safeguards as between the shareholders. Is this a sale under s. 192? The parties to the scheme tell us it certainly is not, it has they say nothing to do with s. 192, but is a compromise or arrangement under s. 120; and, therefore, we have nothing to do with the safeguards for shareholders who dissent from it, we have only to deal with s. 120. My answer is that it is not a compromise or arrangement under s. 120, it is a sale for shares and nothing else and a division of the proceeds of sale without any provision for dissentient shareholders. To that argument Mr. Wright replies that the Court has over and over again approved a sale for shares. Of course it has, but under circumstances when it can approve it. This is not in a form which can be approved as a sale.

For these reasons I finish as I began by saying that I do not know what the enemy is that I have to attack, I cannot see the other side. I am sorry I do not know the reasons that the learned judge gave, because I should wish to treat them with

(1) Sect. 192 = s. 161 in Companies Act, 1862.

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respect, but not having the reasons I cannot controvert them. I think the appeal should be allowed.

WARRINGTON J. I agree and have nothing to add.

Appeal allowed.

Solicitors: *A. J. Greenop & Co.; Ashurst, Morris, Crisp & Co.; Roney & Co.*

H. C. R.

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In re BADGER, DECEASED.

In re BADGER, AN INFANT.

BADGER *v.* BADGER.

[1903 B. 3046.]

Infant—Maintenance—Necessaries—Reversion in Fee in Real Estate—Loan—Charge—Security—Judgment—Land Charges Act, 1900 (63 & 64 *Vict.* *c.* 26), *s.* 2.

An infant ward of Court had no property except a reversionary interest in real estate expectant on the death of a lady aged eighty-five. The infant lived with her mother, who had no means. An allowance of 80*l.* a year had been paid to them for maintenance under an order of the Court, but the fund out of which this had been paid was now exhausted. This was a summons by the infant by her next friend asking for authority to procure annual loans for the purpose of supplying her with necessaries pending the falling in of her reversionary interest, and that each such advance and the interest thereon might be declared to be a debt incurred for and on behalf of the infant for necessaries, and to be payable out of her estate; and that the infant might be bound on attaining her majority to ratify and confirm such contracts and to do everything necessary to give a valid security upon her reversionary interest in case the same had not then fallen into possession:—

Held, that the Court was bound by the decision in *Cadman* v. *Cadman* (1886) 33 Ch. D. 397; that the Land Charges Act, 1900, had not altered the law in this respect, and, in the absence of any property of the infant which could be reached, the Court could not make such an order.

APPEAL from a decision of Joyce J.

S. C. Hincks, who died in 1894, gave his residuary real and personal estate upon trust for his wife for life with remainder to W. D. Badger and M. A. Badger in equal shares. W. D. Badger

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died in 1902 intestate leaving a widow and an only child, Gwendolin Stokes Badger, born in 1900, his heiress-at-law, him surviving. Letters of administration to his estate were granted to Mrs. Badger in the same year, and by an order made on May 9, 1904, accounts and inquiries were directed concerning his estate. By an order of January 16, 1905, it was ordered that 80*l.* a year free of income tax and payable in advance should be allowed for the maintenance and education of the infant Gwendolin Stokes Badger during her minority out of the funds in Court representing her reversionary interest in the personal estate of the testator. The mother and daughter lived together in a small house near Bedford and had no income whatever except this sum of 80*l.* a year. The mother was thirty-five years of age and did nothing to earn a living, and she had no friends who could help her. In November, 1912, the fund out of which the 80*l.* a year was payable became exhausted, and only 17*l.* 9*s.* 6*d.* was received by the mother and daughter instead of 40*l.* Mrs. Hincks, the tenant for life, was alive and aged eighty-five.

This was a summons by Gwendolin Stokes Badger by Pickering Phipps Rice, her next friend, asking that the next friend might be authorized for and on behalf of the infant plaintiff (without incurring any personal liability therefor) to enter into a contract for an annual advance of a sum not exceeding 100*l.* per annum during the minority of the infant plaintiff or until further order, such annual sums to carry interest at the rate of 5 per cent. per annum from the date of each such advance, with half-yearly rests, for the purpose of maintaining and educating the infant plaintiff pending the falling in of her reversionary interest in the real estate to which she was entitled as heiress-at-law of her late father expectant upon the death of Mary Ann Hincks, widow, the tenant for life, now of the age of eighty-five years and upwards, and that each such advance and the interest thereon might be declared to be a debt "incurred for and on behalf of the infant plaintiff for necessaries" and to be payable out of her estate; and that she might be bound on attaining her majority to ratify and confirm the contract and to do all such things as might be necessary to give a valid security upon her reversionary interest in case the same had not then

fallen into possession in order to secure the repayment of the said sums so advanced and the interest thereon respectively, or that such other order might be made as to the Court should seem meet for her benefit.

Joyce J. having regard to the position of the authorities considered that no judge of first instance could make such an order as asked and suggested that the case be taken to the Court of Appeal. Accordingly the infant plaintiff appealed. At the hearing in the Court of Appeal the Court was asked alternatively to make an order giving the mother as guardian of the infant leave to borrow in the name and on behalf of the infant money to be paid into Court and applied for her maintenance.

W. M. Cann, for the appellant. The infant is a ward of Court and the Court is asked to assist her as far as possible. The jurisdiction is undoubted. It is not from any want of jurisdiction that the Court does not act, but from a want of means to exercise its jurisdiction: Simpson's Law of Infants, 3rd ed. pp. 129, 222; *Wellesley* v. *Duke of Beaufort*. (1) The difficulty of charging the freehold reversion of the infant is caused by the rule that has been laid down that the interest of the infant must be vested in possession and that the Court will not give maintenance out of reversionary interests in land. A charge on the contingent reversionary interest in land of an infant for maintenance was allowed in *Fentiman* v. *Fentiman* (2) and in *In re Howarth* (3), where the infant was entitled in possession. The order in *In re Howarth* (3) was in fact made by the Vice-Chancellor of the Duchy of Lancaster in accordance with the expressed opinion of the Court of Appeal, as appears from a copy of the order made which has been obtained by Joyce J. (The order was read to the Court.) But in *In re Hamilton* (4) and *Cadman* v. *Cadman* (5) orders were refused on the ground that the estates were so circumstanced that they could not be delivered in execution. In both the last-mentioned cases the infants' interests were estates tail, whereas in the present case it is an estate in

(1) (1827) 2 Russ. 1, 21.
(2) (1842) 13 Sim. 171.
(3) (1873) L. R. 8 Ch. 415.
(4) (1885) 31 Ch. D. 291.
(5) 33 Ch. D. 397.

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fee, which may serve to distinguish those decisions. Further, these cases really rested on the Judgments Act, 1864, which by s. 1 enacted that no judgment was to affect any land until the land had been actually delivered in execution. This difficulty has been removed by the Land Charges Act, 1900, which repealed s. 1 of the Act of 1864 and by s. 2, sub-s. 1, enacted that a judgment should not operate as a charge on land until a writ or order for the purpose of enforcing it had been registered under the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51). The land need not now be actually delivered in execution. If an order appointing a receiver by way of equitable execution were made and registered there would be a good charge. It appears from *In re Harrison and Bottomley* (1) that a receiver was appointed in the Probate Division of a reversionary interest in land.

[BUCKLEY L.J. The Court of Appeal in that case seems to have been surprised that the receiver had been appointed. At any rate it is not an authority in the Court of Appeal for the appointment of a receiver in such a case.]

The Court of Appeal did not say that the order appointing the receiver was wrong.

If a charge on the land cannot be given we ask the Court to make an order authorizing the mother to borrow, in the name and on behalf of the infant, money to be paid into Court and applied for the maintenance of the infant under the direction of the Court.

[BUCKLEY L.J. That would be useless. It could not be matured into a charge until the infant came of age.]

The Court can authorize the mother to borrow and there is an individual ready to advance the money if he can get such an order. The money would be paid into Court to the account of the infant and applied as the Court should direct for her benefit. The Court can give liberty to pledge the credit of an infant. Money lent to an infant for necessaries is always recoverable, and maintenance is a necessary. If this Court will give the mother authority to borrow we can apply to Joyce J. to fix the amount and apply the fund. A lender would be reasonably safe. If the infant were to die her reversionary interest would be

(1) [1899] 1 Ch. 465.

available to pay her debts by virtue of the Land Transfer Act, 1897. If her interest were to fall into possession during her infancy it could be sold under the Settled Land Acts.

[BUCKLEY L.J. It is difficult to see how the property can be reached. If there is no property that can be rendered available the Court will not express an opinion as to what is a proper sum for maintenance.]

It may be that at present a charge cannot be declared, but the Court can put the proposed lender into a position to get a judgment for the amount he would lend. He would be satisfied with a direction by the Court for the mother to borrow and for the money to be paid into Court.

[HAMILTON L.J. If he paid 5*l.* or 200*l.* into Court we could make an order that the infant's money should be applied for her maintenance and refer it to chambers to ascertain the proper sum. The lender would have a legal debt for necessaries.

BUCKLEY L.J. The Court never makes a declaration where it cannot give relief.]

That is only where there is no means of carrying out the order. We only ask for enough to put the lender in the position of a creditor, so that he can get judgment.

BUCKLEY L.J. This is a case in which the Court has a great desire to assist the infant if it can, but I am sorry to say I have come to the conclusion that under the authorities it is impossible to make such an order as is asked. The facts are shortly these. The infant is an only child living with her mother, who is a widow. The mother is thirty-five years of age, she has no income and does not earn anything. They live in the neighbourhood of Bedford. Hitherto a sum of 80*l.* a year has been allowed for the maintenance of the infant, but the fund from which that payment was derived is now exhausted. The last half-yearly payment was made on November 17 and that amounted to 17*l.* instead of 40*l.* The only property to which the infant is entitled is an equitable reversionary interest in real estate expectant on the death of a lady aged eighty-five. The application is for maintenance out of that property.

The question of maintenance under such circumstances has

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been considered by the Court more than once. In *In re Howarth* (1) the Court of Appeal found their way to make an order charging an estate with the maintenance of an infant, but the estate was in possession not in reversion. That judgment was based on the principle that any one who maintained the infant could obtain a judgment for necessaries supplied by which his inheritance would be bound, and that the order asked was substantially the same thing. But *In re Hamilton* (2) and *Cadman* v. *Cadman* (3) are authorities which are binding on us and which lay down that this Court cannot make an order charging real estate which is not in possession for the maintenance of an infant. In *Cadman* v. *Cadman* (3) Lindley L.J. said that *In re Howarth* (1) went to the very verge of the law and perhaps beyond it and that the application in *In re Howarth* (1) was for an infant with an estate in possession and for past maintenance only. It is said that the ground of the decision in *In re Hamilton* (2) and *Cadman* v. *Cadman* (3) was that estates in reversion could not be delivered in execution under the Judgments Act, 1864, s. 1, which provides that "no judgment . . . . shall affect any land . . . . until such land shall have been actually delivered in execution." It is argued that as that section has been repealed by the Land Charges Act, 1900, the difficulty is removed. In my opinion it is not. Sect. 2 of the Act of 1900 provides that "a judgment . . . . shall not operate as a charge on any interest in land . . . . unless or until a writ or order for the purpose of enforcing it is registered under section 5 of the Land Charges Registration and Searches Act, 1888." As against this reversionary interest in land a lender of money to the infant, even if he recovered judgment, could not issue a writ or get an order for the purpose of enforcing his judgment, so that that section prevents him from getting a charge. Therefore *Cadman* v. *Cadman* (3) is an authority, binding on us, to the effect that it is impossible for us under these circumstances presently to give the proposed lender a charge on this land. It is suggested that something may be done in this way: that although the Court finds no funds of the

(1) L. R. 8 Ch. 415. (2) 31 Ch. D. 291.
(3) 33 Ch. D. 397.

infant which it can reach the Court can express an opinion that the mother may borrow money to obtain necessaries for the daughter, and that that would be a sufficient security for the lender, and that when the infant attained twenty-one the Court could make an order charging the property. The answer is that the Court will not express an opinion as to the propriety and amount of maintenance if there is no property on which it can be charged. In the absence of any property which can be reached the Court will not express any opinion. Then it is suggested that if 5*l.* were now paid into Court and the matter came before us we might send it back to the learned judge and ask him to inquire what would be the right sum to give for necessaries. But if we did that the only result would be that the learned judge would say "This 5*l.* is all the money the infant has. It is proper and I direct that the whole of it shall be applied for her maintenance." He would not go on to determine what larger sum would be proper. Then it is suggested that the proposed lender might pay in 200*l.* at once, and then ask for an inquiry, but these steps he can take for himself without assistance from us. He would, however, have no security. I am sorry to say we cannot make the order asked. The only satisfactory thing is that the reversion will probably fall into possession in a short time, so that there would be no substantial risk to the lender if he did make an advance. The appeal must be dismissed.

HAMILTON L.J. I agree and I also am sorry that the authorities preclude us from making this order. It does not appear that the change made by the Land Charges Act, 1900, assists us. I should have welcomed such assistance and I think it would be right to be ingenious in devising any form of order for the benefit of the infant, but we must confine ourselves within the limits of our jurisdiction, and we cannot make this order. The suggestions which have been made are not within our powers or are not practicable.

Appeal dismissed.

Solicitors: *Johnson, Weatherall & Sturt, for Potter & Crundwell, Farnham, Surrey.*

H. C. R.

SWINFEN EADY J.

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Feb. 21, 26; *March* 3.

In re WOODWARD.

KENWAY *v.* KIDD.

[1912 W. 996.]

Evidence—Public Documents—Non-Parochial Registers—Society of Friends—Births, Marriages, and Deaths—Digest—Certificates of Recording Clerk—Admissibility—Non-Parochial Registers Act, 1840 (3 & 4 *Vict.* c. 92), *ss.* 6, 9.

The registers of births, marriages, deaths and burials kept by the Society of Friends prior to July 1, 1837, when the Births [Marriages] and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), came into operation, were not evidence at common law.

Ex parte Taylor (1820) 1 Jac. & W. 483 (Public Library Register of Dissenters' Births), and *Whittuck* v. *Waters* (1830) 4 C. & P. 375 (Wesleyan Chapel Register of Burials), applied.

On being deposited at Somerset House under the Non-Parochial Registers Act, 1840, these registers became statutory evidence under s. 6, but entries therein are only provable by production of the original registers or by a certificate under the seal of the General Register Office under s. 9.

A certificate certified by the recording clerk of the Society as a true extract from the Society's digest of those registers is inadmissible (*a*) on the above grounds and (*b*) on the ground that it is only an extract from a digest of registers that are still in existence.

Adjourned Summons.

By his will dated September 8, 1855, Walker Woodward gave and bequeathed all his estate to his mother and brother in equal shares and appointed them executors.

The testator died a bachelor on February 22, 1912, his mother and brother having predeceased him.

On March 30, 1912, the plaintiff, one of the next of kin, took out letters of administration with the will annexed, and on April 12, 1912, she issued a summons for an inquiry as to the statutory next of kin.

On June 6, 1912, the Court ordered (inter alia) "an inquiry who were the persons entitled by virtue of or according to the Statute of Distribution to the estate of the above named testator Walker Woodward living at the time of his death and whether any of them are since dead and if dead who are their respective legal personal representatives."

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On June 29, 1912, the plaintiff issued a summons to proceed with this order.

In proof of the pedigree prior to July 1, 1837, when the Births [Marriages] and Deaths Registration Act, 1836, came into operation, various certificates of births, marriages, deaths and burials certified by the recording clerk of the Society of Friends as true extracts from the Society's digest were tendered in evidence, but, the Master being doubtful as to their admissibility, the summons to proceed was adjourned into Court on this point.

It appeared that the Society of Friends had always kept very complete registers of the births, marriages, deaths and burials of its members from the time of its foundation in or about 1650 to the present time. Marriages took place in the local meeting house and were presented and recorded at the next local monthly meeting. Births, deaths, and burials were presented and recorded at the monthly meetings, a death and burial being recorded together. These records were regularly transmitted to the head office of the Society and duly entered in their registers.

In 1840 the 1500 registers prior to July 1, 1837, were deposited at Somerset House under the Non-Parochial Registers Act, 1840, a topographical, alphabetical, and chronological digest having been previously made by the Society's direction at a cost of 3000*l.*, and the entries checked by the recording clerk at the time. This digest, hereinafter called digest A, was retained by the Society.

The deposited registers became statutory evidence under s. 6 of the Act and the entries were provable by production of the original registers or by certificates under the seal of the General Register Office under s. 9. As, however, there was no sort of index to the 1500 volumes at Somerset House, it was practically impossible to trace any entry without first obtaining a certified extract from digest A. This was issued by the recording clerk in the form of a certificate at the usual charge of 3*s.* 7*d.* It contained all essential particulars, and the recording clerk gave evidence to prove that for the past seventy years similar certificates had been accepted in Courts of justice and by banks and insurance companies without question.

The registers beginning July 1, 1837, were still kept and

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retained by the Society, and an alphabetical and chronological digest for the whole kingdom was prepared and constantly written up to date, the topographical arrangement being discontinued. Certificates from this digest, hereinafter called digest B, were occasionally issued and used in evidence, but as there was no difficulty in obtaining Somerset House certificates for this period, the parties had not obtained certificates from this digest.

In these circumstances 140 certificates of births, marriages, deaths and burials prior to July 1, 1837, extracted from digest A, were obtained from the Society at a cost of 25*l.* 1*s.* 8*d.*, the pedigree since that date being proved by ordinary certificates.

Tomlin, for the plaintiff. Certificates from both digests have been accepted without question for the past seventy years. For instance, in *In re Arthington, Whiting* v. *Jowitt* (1) three marriage and four birth certificates from 1781 to 1823 extracted from digest A were exhibited to an affirmation of John Rawlinson Ford filed June 21, 1904, in support of a claim to a share in a large residuary estate, the pedigree after July 1, 1837, being proved from the General Registry. Again in *In re Waite, Mounsey* v. *Richardson* (2)—an administration action—one marriage, one burial, and eight birth certificates dating from 1847 to 1860 extracted from digest B were exhibited to an affirmation of John Barclay filed January 21, 1878, which expressly described them as extracts from the digest. The burial certificate records the date of death and burial. I am told this affirmation was used in Court without objection.

[SWINFEN EADY J. The point as to their admissibility was not discussed, and I cannot therefore accept those instances as authorities.]

They are not authorities, but a uniform practice for seventy years cannot be entirely disregarded. I am, however, only asking to put in certificates prior to July 1, 1837, so that I have only to deal with the old registers and digest A. Owing to the want of any sort of index to the 1500 old registers at Somerset House, it is practically impossible to trace any entry there without first getting an extract from digest A. It is true that

(1) [1902 A. 1037] unreported. (2) [1877 W. 127] unreported.

the entry can then be traced and an ordinary certificate obtained, but this involves paying for two certificates of all entries in these old registers. The parties ought not to be put to this double expense.

The mere fact that these certificates are not statutory evidence within the Non-Parochial Registers Act, 1840, does not make them inadmissible. The old registers and (semble) digest A were documents kept by the recording clerk of the Society in pursuance of his duty to the Society, containing entries concerning people interested in the Society, and made originally with the intent that they should be retained and kept as a register to be referred to ever after. They were therefore admissible as public documents within Lord Blackburn's statement in *Sturla* v. *Freccia* (1), where it is expressly pointed out that "public" need not mean the whole world, but that an entry in the books of a manor, or in a corporation book concerning something in which all the corporation is concerned, is public in this sense. If this is so, the registers and digest A were in the nature of public records, and need not have been produced nor proved by subscribing witnesses. A certified copy was sufficient: *Birt* v. *Barlow*. (2) It is true that in *Ex parte Taylor* (3) an entry in the register of births of dissenters' children kept at Dr. Williams' Library was rejected, but the report is very short, and it does not appear that the register was kept by the responsible officer of any particular body of dissenters in pursuance of his duty to that body. (4) In *Lloyd* v. *Passingham* (5) Lord Eldon L.C., while giving no opinion that the Fleet register was evidence as a register, was not prepared to say it might not be received as evidence of the fact of marriage, if evidence was produced that uniformly an entry of marriage was made.

(1) (1880) 5 App. Cas. 623, 643, 644.

(2) (1779) 1 Doug. 171, 174.

(3) 1 Jac. & W. 483.

(4) It was in fact kept by the librarian under an arrangement with the deputies of the three denominations of Presbyterians, Independents, and Baptists. The librarian issued forms of certificates to be signed by parents and witnesses. These were copied into a book and filed, and a tabular index kept.—Report on Parochial Registration, Aug. 15, 1833, p. 79. Parliamentary Papers, vol. 14, No. 669.

(5) (1809) 16 Ves. 59, 63.

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It must be remembered that Quaker marriages were always recognized by the English law. Being specially excepted from the Marriage Act, 1753 (26 Geo. 2, c. 33), s. 18—Lord Hardwicke's Act—and from the Marriage Act, 1823 (4 Geo. 2, c. 76), s. 31, Quakers never became liable to be married in church, so that the ordinary evidence from the parish register was not forthcoming. The Marriage Act, 1836 (6 & 7 Will. 4, c. 85), s. 2, which came into operation on July 1, 1837, while still permitting Quaker marriages required notice to the registrar and issue of his certificate in the case of future marriages, but any doubt as to the validity of marriages before that date was removed by the Quakers and Jews Marriages Act, 1847 (10 & 11 Vict. c. 58). Is it conceivable that in cases arising before July 1, 1837, the law while expressly admitting the validity of Quaker marriages would have declined to allow them to be proved by the only registers then available? If so, a legal marriage in 1755 after Lord Hardwicke's Act might quite well have become incapable of proof in 1835 when all the witnesses were dead. In *Birt* v. *Barlow* (1) Lord Mansfield C.J., after pointing out that marriages are not always registered, i.e. in the parish registers, says: "There are marriages among particular sorts of dissenters, where the proof by a [parish] register would be impossible, and Dennison, Justice, in a case of that kind which came before him, admitted other proof of an actual marriage." Surely Dennison J. would have admitted the Quaker registers to prove such a marriage.

There is apparently no express decision as to the admissibility of a digest, but in *In re Sandbach School and Almshouse Foundation* (2) both Ecton's Thesaurus and the Index to the Orders in Council published in the *London Gazette* were referred to to shew that two hamlets were chapelries of Sandbach and not separate parishes. The evidence was not objected to, so that the case is no authority on the point, and I only mention it by way of illustration.

Ashton Cross, for the defendant, another of the next of kin, adopted the above argument.

Cur. adv. vult.

(1) 1 Doug. 171, 174. (2) [1901] 2 Ch. 317, 320, 323.

March 3. SWINFEN EADY J. This summons was adjourned into Court for the purpose of obtaining a determination of the question whether certain certificates of births, marriages, and deaths signed by the recording clerk of the Society of Friends are admissible in evidence, the officer of the Society having stated in his affirmation that such extracts certified by the recording clerk of the Society have for the past seventy years been accepted in Courts of justice and by banks and insurance companies without question as evidence of the statements contained therein.

An inquiry is proceeding in chambers to ascertain who were the persons entitled by virtue of or according to the Statute of Distribution to the estate of the testator Walker Woodward, living at the time of his death, and whether any of them are since dead, and if dead who are their respective legal personal representatives. There is a considerable fund awaiting distribution.

In proving the pedigree of the persons claiming to be entitled, 140 extracts or certificates of births, marriages, deaths and burials have been exhibited to an affidavit of Emily Kidd and to an affirmation of Sarah Pumphrey.

It appears from the affirmation of Mr. Isaac Sharp, who has for twenty-two years been the recording clerk of the Society of Friends, that each of the extracts is a true copy of so much of a digest kept at Devonshire House, 136, Bishopsgate, E.C., (the central premises of the Society,) as records the fact of the particular birth, marriage, death or burial therein referred to, and each extract is certified by him to be a true extract from the digested copy of the registers kept at the central office of the Society. It further appears from Mr. Sharp's affirmation that the Society of Friends was founded about the year 1650, and from that time to the present it has kept very complete registers of the births, marriages, deaths and burials of its members.

In addition to the registers themselves, a full digest of the entries is kept and so arranged that the entries in the registers can readily be found. In the year 1840, the registers prior to July 1, 1837, were deposited with the Registrar-General, pursuant to the provisions of the Non-Parochial Registers Act, 1840, but

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the digest for the same period was retained by and is still in the possession of the Society. All the registers from July 1, 1837, and the digest for this subsequent period have been retained by and still remain in the possession of the Society. The extracts in question on this summons are for the earlier period—indeed they are all between the years 1740 and 1760.

Entries in the records of the Society of Friends are readily traced and found by means of the digests, which form a complete index, but I am told that there is not any index in the General Register Office to the very numerous volumes of registers deposited there by the Society. An extract from one of these registers at Somerset House is now before me, being from a register of births for the year 1835, and this register or record is numbered at the General Register Office "Society of Friends, 854," and in a note to Taylor on Evidence, 10th ed. p. 1095, it is stated that the registers deposited consisted of more than 7000 books.

These non-parochial registers deposited were made evidence by the Act. By s. 6 of the Non-Parochial Registers Act, 1840, the registers and records deposited in the General Register Office by virtue of the Act shall be deemed to be in legal custody and shall be receivable in evidence in all Courts of justice. Under this provision, the registers of the Society of Friends prior to July 1, 1837, which were duly deposited, were made legal evidence.

Previously the registers deposited were not evidence. It appears from the note in Taylor on Evidence, to which I have previously referred, that among the non-parochial registers was a valuable collection transmitted from Dr. Williams' Library in Red Cross Street. A question as to the admissibility of an entry in this register was raised at the Rolls in 1820 before Sir Thomas Plumer in *Ex parte Taylor*. (1) It was a petition for payment of a legacy to a legatee who was stated to have attained twenty-one. To prove his age, an examined copy of an entry in the register of the births of dissenters' children, kept at Dr. Williams' Library in Red Cross Street, was produced, but the Master of the Rolls held that it was not evidence that the Court could act on. *Whittuck* v. *Waters* (2) is to the same effect.

(1) 1 Jac. & W. 483. (2) 4 C. & P. 375.

The registers of the Society of Friends for the period to which the extracts in question relate are in the same position as this register kept at Dr. Williams' Library, except so far as made evidence by statute. They were not kept by any public authority, or in the performance of any public duty, and are not official records; and although in fact the entries may have been recorded with scrupulous care, regularity, and accuracy, they are not legal evidence, except so far as made so by statute.

There is indeed a further objection to the extracts sought to be used on this inquiry: that they are not extracts from the registers themselves, but from a digested copy of those registers, the original registers being in existence, duly deposited at the General Register Office, and the entries therein capable of proof in the manner provided for by statute by a certified copy under the seal of the General Register Office.

I therefore determine that these certified extracts are not admissible in evidence.

Solicitors: *Richard F. & C. L. Smith; Lee, Ockerby & Everington.*

G. R. A.

NEVILLE J. 1912 *Dec.* 3, 4. 1913 *Feb.* 5.

In re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY.

[00013 of 1911.]

Building Society—Winding-up—Pensions—Proofs—Voluntary Allowance—Ultra vires.

A building society, in addition to the usual business of a building society, carried on banking and other businesses. All these businesses were housed in one building and were managed by the same board of directors and were served by the same staff. The society was ordered to be wound up in 1911, and the banking business was held to be ultra vires the society.

In 1903 A., a correspondence clerk of the society, retired at the request of the board and was promised a pension; and in 1906 B., a clerk in the banking business, retired at the request of the board and was promised a pension. Both pensions were duly paid until the winding-up order, and A. and B. claimed to prove in the winding-up for the capital value of their respective pensions:—

Held, that A.'s pension was merely a voluntary allowance not founded on any contract, and therefore his claim failed.

Held, also, that B., apart from any question of contract, being employed in the banking business which was ultra vires, could not prove against the assets of the society.

ADJOURNED SUMMONS.

This was an application to determine whether two pensioners, named Hill and Hefford respectively, were entitled to rank as creditors of the above-named society in respect of the pensions they were respectively receiving from the society at the date of the winding-up order of June 20, 1911.

The society had been established many years and, in addition to carrying on the original business of a benefit building society, was divided into several branches, known as the Second Birkbeck Building Society, the Birkbeck Property and Investment Trust, the Birkbeck Share and Debenture Trust, and the Birkbeck Bank. All these institutions were housed in the same building and were managed by the same board of directors and managers and were served by the same staff, there being no separate staff for any one branch of the society. It was the duty of the staff to obey orders and carry out the instructions of the directors and

managers, whatever they might be, in respect of the different branches of the business so carried on in the building.

When Hill and Hefford respectively entered the service of the society and during the time of their service there were no rules as to the age at which officials should be retired, nor was there any system of compulsory retirement or any pension fund. But in the year 1903 the directors of the society instituted a scheme in the nature of a pension fund to which the whole of their staff was required to subscribe some portion of their salaries, and to which the society also contributed, and after that date the society's servants were entitled on retirement to a pension derivable from that fund. The scheme came into operation on April 1, 1903, but Hill and Hefford, who were two of the oldest employees of the society, were expressly exempted from the scheme and did not contribute thereto.

Hill entered the service of the society in the year 1866. His duties consisted in keeping the accounts of its building society business and its banking business, and he had to give his time and attention to the work connected with all the departments of those two branches. At the date of his retirement he was drawing a salary of 550*l.* per annum and was the principal cashier in the country department of the banking business.

In June, 1906, the secretary of the society sent for him and told him he must retire, and promised that if he would do so he should receive a pension of 250*l.* per annum. Hill agreed to this and did retire on June 30, 1906, from which date until the date of the winding-up he received his pension monthly.

Hefford entered the service of the society in the year 1875, as correspondence clerk, and at the date of his retirement was drawing a salary of 345*l.* per annum. Throughout the time of his service his duties comprised attending to and answering all the correspondence of the Birkbeck Permanent Benefit Building Society, the Second Birkbeck Building Society, the Birkbeck Property and Investment Trust, and the Birkbeck Bank, there being no separate staff for those different branches. When the Share and Debenture Trust was formed he had also to attend to all the correspondence in connection with that trust. He had also to write up all the minutes of the directors of the Birkbeck

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Permanent Benefit Building Society and of the Second Birkbeck Building Society.

On April 1, 1903, Hefford received a letter from the secretary of the society which, omitting formal parts, was as follows:— "The Staff Committee have asked me to obtain your resignation so as your term will expire on the 30th of June next. As you will be outside the superannuation scheme the directors considered your past services and intend to grant you a pension of 160*l.* p. a. during good conduct." In accordance with this letter Hefford retired on June 30, 1903, from which date until the date of the winding-up order he received his pension monthly.

Hill and Hefford lodged proofs in the winding-up against the assets of the society for the capital value of their respective pensions. The official receiver rejected their proofs on the ground that the pensions were a voluntary allowance and that there was no contract under which they could be enforced. Hill and Hefford issued a summons appealing against this decision.

H. E. Wright, for the applicants. The authorities shew that a company of this character, even if there is no provision in its articles, can grant pensions to old servants for past services on their retirement: *Henderson* v. *Bank of Australasia.* (1) The question in each case is whether the pension was a matter of grace and not by way of obligation. It is submitted that under the circumstances the acceptance of their resignation given on the promise of a pension constituted a good contractual obligation. A slight consideration will support such a contract: *Moss* v. *Hall.* (2)

J. W. Galbraith, for the liquidator. Hill at the time of his retirement was employed in the banking business, which was ultra vires the society.

H. E. Wright. I do not contend that the banking business was not ultra vires, but Hill's employment was simply a contract of service and his duty was to obey the orders of the directors, and he could at any time be transferred from one branch to another. At one time his service was intra vires and at another

(1) (1888) 40 Ch. D. 170, 178. (2) (1850) 5 Ex. 46.

ultra vires. How was he to know that his employment was unlawful? His contract was not to serve in any particular branch but to serve wherever they placed him and to perform whatever duties they gave him. It was no part of his duty to satisfy himself that they were carrying on an intra vires business. It would be extremely hard if he is to be deprived of his pension on such a ground. There is no direct authority on the point. His employment in its inception was legal and gradually drifted into the banking department, but he was generally employed and rendered services not only for banking but also for building society purposes, and the legal part of his employment is not, it is submitted, affected by the illegal part of it: *Mallan* v. *May*. (1)

J. W. Galbraith, for the liquidator. The onus is on the applicants to prove a binding contract for a pension. It is submitted that in both cases the pension was purely a voluntary allowance. There was no discharge without due notice and no legal claim for not being continued in receipt of their salaries. It was not granted as compensation for any legal loss they had sustained: *Hutton* v. *West Cork Ry. Co.* (2) It was competent for the directors to terminate their employment on giving notice. In Hill's case, he was employed in service that was partly good and partly bad, but it was an indivisible contract and the legal cannot be severed from the illegal part. Therefore the whole contract is void. The analogy of the cases under the Statute of Frauds applies, where it has been held that if the consideration for a promise contained in a contract is unlawful the whole agreement is void: *Chater* v. *Beckett* (3); *Thomas* v. *Williams* (4); *Kearney* v. *Whitehaven Colliery Co.* (5)

H. E. Wright in reply.

NEVILLE J. In my opinion both these claims fail. In the case of Mr. Hefford I think there was no contract, and that the pension was a pure gratuity. I think the letter of April 1, 1903, which is the record of the transaction at the time, is clear about it. Mr. Hefford is told in effect that the managing director

(1) (1843) 11 M. & W. 653.
(2) (1883) 23 Ch. D. 654, 663, 670.
(3) (1797) 7 T. R. 201.
(4) (1830) 10 B. & C. 664, 671.
(5) [1893] 1 Q. B. 700, 713.

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is to obtain his resignation. That was only a polite way of saying "If you do not go, you will be sent away." Then the letter says "As you will be outside the pension scheme, the directors have considered your past services and intend to grant you a pension of 160*l.* a year." I think it is impossible to hold that, at that time or at any other time, there was a contract entered into by the Building Society under which they bound themselves to pay him 160*l.* a year by way of pension.

With regard to Mr. Hill, apart from the question whether there was or was not a contract, it is clear to my mind that, the applicant being at the time the pension was granted simply employed as cashier in the banking business, which was an ultra vires institution altogether, he cannot prove against the assets of the Building Society.

Solicitors : *Nunn, Popham & Co.; Rubinstein, Nash & Co.*

H. L. F.

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In re FANE.

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[1912 F. 725.]

Will—Devise—Trust to convey to Uses subsisting in another Estate at Death of Tenant for Life—Rule against Perpetuities.

Testator was tenant for life in possession of the W. estate and owner in fee of the D. estates. By his will he devised his D. estates to trustees upon trust to pay the rents and profits to his wife during her life and after her decease upon trust to raise two sums of 4000*l.*, and subject thereto upon trust to assure the said estates "to such uses for such estates and with and subject to such powers and provisoes as under and by virtue of" two deeds of July 5, 1854, and February 26, 1859, "and all mesne assurances acts and operations of law" should at the time of the death of his wife be subsisting and capable of taking effect of and concerning the W. estate. The testator died in 1875, and shortly afterwards there was a resettlement of the W. estate. The widow died in 1912. At her death there was nothing in the then subsisting uses, powers, and provisoes of the W. estate which if inserted in the testator's will would have given rise to objection on the ground of remoteness :—

Held, reversing the decision of Eve J., that the trusts declared of the D. estates after the death of the widow were valid.

Per Buckley L.J.: *Lord Dungannon* v. *Smith* (1846) 12 Cl. & F. 546, is not an authority for the proposition that the rule against perpetuities is infringed by uncertainty at the testator's death whether the limitations introduced by reference will or will not exceed the rule.

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FANE, *In re.* FANE *v.* FANE.

APPEAL from a decision of Eve J.

Colonel John William Fane, by his will dated September 14, 1868, devised all his lands, hereditaments, and estates in the county of Dorset unto and to the use of trustees, their heirs and assigns, upon trust to manage and order all the affairs thereof and to pay the rents, issues, and profits after deducting all expenses of management to his wife, Victoria Fane, during her life, and from and after her decease he directed his trustees to raise and pay thereout two sums of 4000*l.* each and subject thereto to stand seised of the said estates "Upon trust to limit and assure the same . . . . to such uses for such estates and with and subject to such powers and provisoes as under and by virtue of" two deeds dated respectively July 5, 1854, and February 26, 1859, "and all mesne assurances acts and operations of law shall at the time of the death of my said wife Victoria Fane be subsisting and capable of taking effect of and concerning" his Wormsley estate, "it being my wish and desire that subject to the life interest therein of my said wife and the raising of the said sums of 4000*l.* and 4000*l.* hereinbefore authorized to be raised (if the same shall be raisable) my Dorsetshire estates . . . . shall go with and be subject to the same uses trusts powers and provisoes as shall at the decease of my said wife Victoria Fane be subsisting of and in the said Wormsley estate." And the testator gave, devised, and bequeathed unto his trustees all the residue of his real and personal estate upon trust to sell and convert and out of the moneys arising from the said sale and conversion to pay his funeral and testamentary expenses, debts, and a certain legacy of 600*l.*, and to stand possessed of the residue in trust for his son John Augustus Fane absolutely.

The testator died on November 19, 1875.

The testator's widow died on February 27, 1912.

Under the two deeds of July 5, 1854, and February 26, 1859, the Wormsley estate stood limited at the date of the testator's will to the use of the testator for life with remainder, subject to

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certain powers of appointment, to John Augustus Fane, the testator's eldest son, in tail male.

By various mesne assurances and ultimately by a deed dated November 1, 1876, the Wormsley estate became vested in John Augustus Fane in fee simple.

By a deed dated December 27, 1877, the Wormsley estate was resettled subject to existing charges thereon to the use that Eleanor Fane, the wife of John Augustus Fane, should take and receive out of the rents and profits of the Wormsley estate during the joint lives of herself and John Augustus Fane the yearly sum of 500*l.*, and to the further use that the trustees of the settlement should take and receive out of the said rents and profits an annual sum of 1000*l.* for the term therein mentioned (not being longer than the life of John Augustus Fane) and upon the trusts thereby declared thereof, with remainder to the use of John Augustus Fane for his life, with remainder to the use of John Henry Scrope Fane, the eldest son of John Augustus Fane, for his life, with remainder to the use of the first and other sons of John Henry Scrope Fane successively in tail male, with remainder to the use of Francis Luther Fane, the second son of John Augustus Fane, for his life, with remainder to the first and other sons of Francis Luther Fane successively in tail male, with remainder to the use of Sydney Algernon Fane, the third son of John Augustus Fane, for his life, with remainder to the first and other sons successively of Sydney Algernon Fane in tail male, with remainder to the use of the fourth, fifth, and every other son of John Augustus Fane born after the date thereof in tail male, with remainder to the use of John Augustus Fane in fee simple. And the deed contained a power to John Augustus Fane if Eleanor Fane should die in his lifetime at any time or times either before or after his second or any other subsequent marriage and to every other person thereby made tenant for life of the Wormsley estate at any time or times either before or after such other person should be entitled to the possession or to the receipt of the rents and profits of the said estate by deed revocable or irrevocable or by will or codicil to appoint to any woman with whom he might marry or have married for her life or for any less period any yearly rent-charge

or yearly rent-charges not exceeding in the whole the yearly sum of 600*l.* to be issuing out of the said Wormsley estate.

John Augustus Fane died on August 19, 1908, having by his will dated March 5, 1902, appointed executors and bequeathed the residue of his personal estate to his son Francis Luther Fane and his daughter Amy Eleanor Fane absolutely in equal shares. The will contained no disposition of real estate.

John Augustus Fane was married once only, namely, to Eleanor Fane, who predeceased him. He had four sons only, all of whom were born in the original testator's lifetime, namely, John Henry Scrope Fane, Francis Luther Fane, Sydney Algernon Fane, and Augustus Walter Fane.

John Henry Scrope Fane, the present tenant for life of the Wormsley estate, was a bachelor.

Francis Luther Fane died on February 6, 1906, without issue.

Sydney Algernon Fane was married in 1894 and had issue.

Augustus Walter Fane died on December 21, 1893, a bachelor.

This was an originating summons taken out by the present trustees of Colonel Fane's will for the determination of the question whether the trusts declared by the will after the death of the widow of the Dorsetshire estates (and subject to the raising thereout of the two sums of 4000*l.*) or any and which of such trusts were at the death of the widow good and subsisting trusts and as such ought to be executed by the applicants.

Eve J. held that the trusts were void as infringing the rule against perpetuities. His Lordship said that the question was whether at the date of the testator's death any one could have predicated that ex necessitate the Wormsley estate must at the date of the death of his widow be so settled as not to bring the limitations within the rule against perpetuities. Obviously there could be but one answer to that question. No one could have so predicated. It was true that in the events which had happened and under the settlement which in fact affected the Wormsley estate at the death of the testator's widow the limitations did not infringe the rule, but that was not sufficient to validate the terms of the testator's will. Having regard to *Lord Dungannon* v. *Smith* (1), and more particularly to what was

(1) 12 Cl. & F. 546, 612.

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there said by Tindal C.J., his Lordship was of opinion that the limitations were infected with the vice of their possibly exceeding the prescribed limit, and when that happened the limitations were altogether void. In those circumstances his Lordship must answer the question raised by the summons by saying that the trusts declared by the will after the death of the widow of the Dorsetshire estates were void and that the estates passed under the residuary devise.

The persons entitled under the limitations of the Wormsley estate appealed.

The trustees of the will were not represented by counsel on the hearing of the appeal.

E. Clayton, K.C., and *Edward Beaumont*, for the appellants. The question in this case is whether the trusts of the Dorsetshire estates after the death of the widow infringe the rule against perpetuities, and it is submitted that they do not. If the limitations to which the Wormsley estate was subject at the death of the widow had been written in the will of the testator they would have been valid, because all the persons to whom interests were given were lives in being at the testator's death, and the remaindermen must have attained vested interests within due time afterwards: all the grandchildren were lives in being at his death. For the purpose of the rule against perpetuities it is necessary to consider whether the limitations may possibly exceed legal limits, but the time at which this has to be done is when there is a complete will; and when uses are limited by reference to uses existing under another instrument at a future time or are to be limited under a power of appointment it is necessary to wait until the time comes or the power is exercised. If a power is exercised in favour of objects within legal limits it is not invalidated by the fact that it was wide enough to authorize an exercise beyond those limits. Otherwise marriage settlements would be nugatory, if framed as they often are, so as to give life estates with a power to appoint to issue without limit of time. In the present case you must wait until the will is complete in order to see whether the rule is infringed. The date at which the will becomes complete

is the death of the widow. The widow having recently died the period has now arrived for ascertaining what the limitations are and whether they are good or bad. There can be no objection to this. *Lord Dungannon* v. *Smith* (1), upon which Eve J. relied, was a decision on the construction of the particular will in that case which allowed of persons too remote coming in.

[BUCKLEY L.J. I do not see any difficulty in that case.]

The limitations of this will are executory and not executed. In many cases the Court has construed executory limitations cyprès and has so moulded them as not to infringe the rule against perpetuities. It is submitted, however, in the present case that it would not have made any difference if the limitations had been executed.

[COZENS-HARDY M.R. referred to *Avern* v. *Lloyd* (2) and the comments on that case in *In re Hargreaves.* (3)]

The rule against perpetuities is founded on public policy, and there is no objection on that ground to waiting until the death of the widow for the completion of the will.

Our contention is summed up in the following passage from Gray on Perpetuities, 2nd ed. p. 349: "An executory trust is invalid unless its execution must take place, if at all, within twenty-one years after lives in being. But if it must be executed within that time it is good, so far as it can, according to its terms, be executed in favor of objects not too remote from the date of its creation. The possibility that it may not be capable of such execution does not render it wholly void." It is submitted that the limitations in the present will are valid and that the appeal ought to be allowed. [They also referred to Lewis on Perpetuities, p. 487.]

P. O. Lawrence, K.C., and *J. E. Harman*, for the respondents. It is quite clear upon the facts that this gift infringes the rule against perpetuities. In order that the gift may be good you must be able to predicate at the death of the testator that the limitations will vest in transmissible interest within the period allowed by the rule. This is not the case of a power, but of

(1) 12 Cl. & F. 546. (2) (1868) L. R. 5 Eq. 383.
(3) (1890) 43 Ch. D. 401.

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absolute limitations. The trust is to convey to such uses as shall be existing under any assurances relating to the Wormsley estate. It is enough under the rule that some of the limitations may infringe it. It is a mere accident that the present limitations of the Wormsley estate do not infringe the rule. The rule does not allow dispositions to be so framed as to make it impossible to predicate at the testator's death that the property must vest in transmissible interest within the limit allowed by the rule. In the present case no one could have predicated at the testator's death that at the death of the widow all the subsequent limitations of the Wormsley estate would be within the rule. That being so the gift is bad: *Lord Dungannon* v. *Smith.* (1) The appellants cannot succeed by saying "We can now produce deeds which shew that we come within the rule."

The analogy of powers does not apply. They stand upon an altogether different footing: Gray on Perpetuities, 2nd ed. p. 487.

[BUCKLEY L.J. What do you say as to a general power?]

A general power is one which the donee can exercise in his own favour and is in the nature of property. It does not relate back to the date of the instrument creating it. A special power is different: the appointment under it has to be read into the original instrument. In the present will there is no power of appointment. No power of selection is given to the trustees. Persons outside the limits of the rule may come in and demand a conveyance. The trustees are bound to convey to such uses as may be subsisting concerning the Wormsley estate notwithstanding that some of them may exceed the limits allowed by the rule. [They also referred to *Slark* v. *Dakyns.* (2)]

Edward Beaumont in reply.

Cur. adv. vult.

Feb. 20. COZENS-HARDY M.R. This is an appeal from an order made by Eve J., who has held that the trusts declared by the will of the testator, who died in 1875, after the death of his widow, who died in 1912, are void for remoteness.

The testator was tenant for life in possession of the Wormsley

(1) 12 Cl. & F. 546. (2) (1874) L. R. 10 Ch. 35.

estate, and was owner in fee of estates in Dorsetshire. There were incumbrances on all the estates, to which it is not necessary to refer. By his will, dated in 1868, he devised his Dorsetshire estates to trustees, upon trust to pay the rents and profits to his wife during her life, and after her decease upon trust to raise two sums of 4000*l.*, and subject as aforesaid upon trust to assure the estates "to such uses for such estates and with and subject to such powers and provisoes as under and by virtue of" two deeds of July 5, 1854, and February 26, 1859, "and all mesne assurances acts and operations of law" as should at the time of the death of his wife be subsisting and capable of taking effect of and concerning the Wormsley estate. Shortly after the testator's death there was a resettlement of the Wormsley estate. But at the death of his widow in 1912 it turned out that there was nothing in the then subsisting uses, powers, and provisoes of the Wormsley estate which, if inserted in the testator's will of 1868, would have given rise to objection on the ground of remoteness. Eve J. has held that, as at the testator's death it was impossible to say whether the limitations of the Wormsley estate at the widow's death would or would not exceed the prescribed limit, the trust is void for remoteness.

Now it is important to observe that the date at which the trust is to arise is the death of the widow, the tenant for life,—a period to which no possible objection can be taken—and that the persons to take are to be ascertained at the same moment. On principle it is not easy to state the objection to this. The analogy of a special power of appointment in favour of issue seems very close. Such a power may be executed so as to be free from the rule, or it may not. The fact that within the terms of the power an appointment could be made which would be too remote is of no moment; you must wait and see how in fact the power has been executed, and in order to test the validity of the appointment you must treat the appointment as if written in the original instrument creating the power.

During the argument I was under the impression that powers might be regarded as an isolated exception from the general rule, but our attention was not called to any authority, nor have I since been able to find any authority, supporting this view.

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Eve J. seems to have considered himself bound by what was said by Tindal C.J. in *Lord Dungannon* v. *Smith* (1), but with great respect I think those observations were addressed to a different point. When you have an instrument containing a gift to a person or a class of persons as to whom you cannot at the date when the instrument becomes operative settle whether the rule against perpetuities will apply, it is not sufficient to say that in the event there is a person or there are some members of a class who might take notwithstanding the rule. There is, however, in the present case no question of construction under the will. There is merely a life estate to the widow followed by a gift to persons to be ascertained at the moment of her death. At that moment for the first time you ascertain what words have to be written in the will, and if the words then written in are free from objection on the ground of remoteness, I see no reason why the devise should fail. I think we are really asked to extend the doctrine of remoteness beyond precedent and beyond principle. In my opinion the order of Eve J. must be discharged and the appeal allowed.

Buckley L.J. The testator, John William Fane, by his will of September 14, 1868, devised his Dorsetshire estates to trustees upon trust for his wife for life and after her decease upon certain trusts to raise sums of 4000*l.* and 4000*l.*, and subject thereto directed that his trustees should stand seised of his Dorsetshire estates upon trust to limit and assure the same to such uses for such estates, &c., as under two deeds of 1854 and 1859 and all mesne assurances and acts and operations of law should at his wife's death be subsisting and capable of taking effect of and concerning the Wormsley estate, it being his wish that his Dorsetshire estates should go with and be subject to the same uses, trusts, powers, and provisoes as should at his wife's death be subsisting of and in the Wormsley estate. The testator died on November 19, 1875. The widow died on February 27, 1912. At the last-mentioned date the Wormsley estate stood limited in such manner as that if the limitations were written into the testator's

(1) 12 Cl. & F. 546, 612.

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will the rule against perpetuities would not be infringed. The order under appeal is one which declares that the trusts are void for remoteness. The question is whether this is right.

The rule against perpetuities is that an executory trust or limitation not only may but necessarily must take effect if it takes effect at all within a life or lives in being and twenty-one years after, and if at the time of its creation the limitation is so framed as that an event can be named in which, if it should happen, the rule would be infringed, the limitation is bad. If, therefore, the limitations being known, an event can be pointed to such that if it happens the rule will be infringed, the limitation is bad. But the decision under review affirms that if at the date of the instrument (in this case the will) the limitations are not known, but are to be determined in an indicated manner, the devise must fail because it may turn out when they are known that they infringe the rule against perpetuities. I am not aware of any authority for that proposition. It seems to me in principle wrong and inconsistent with the decisions (and they are many) upon the question of powers.

General powers are exempt from the restrictions of the rule against perpetuities because the existence of a general power leaves the property in a position which for the present purpose does not differ from that in which it would stand if there were an absolute owner. There exists by the existence of the power a present immediate and unrestrained alienability, and there is no necessity to consider in such case how far a perpetuity may be created any more than it is necessary to consider it in the case of an absolute owner.

Particular or special powers such as a power to appoint among a named class of persons differ from general powers in that the donee has not an unrestricted power of alienation, and in that case the rule against perpetuities requires that all limitations made in pursuance of the power shall be such only as would have been valid if inserted in the original will or settlement: Sugden on Powers, 8th ed. p. 396. When the power is exercised the limitations created under it are to be written into the instrument which created the power,

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and if and so far as they do not exceed the rule against perpetuities they are good. At the date of the instrument creating the power the limitations are in such a case not known. Their form depends upon the future action of the donee of the power. It may be that he will so exercise the power as to transgress the rule; if so the limitations fail. It may be that he will so exercise it as not to exceed the rule; in that case the limitations hold good. At the date of the instrument creating the power it is impossible to say whether the rule will be transgressed or not, but this uncertainty does not render the limitation bad. I cannot myself see any distinction between that case and the present. In the present case the limitations are ascertained, not, it is true, by seeing how the donee of a power exercises it at a future date, but by seeing how another estate stands limited at a future date. The determination of the limitations rests in the volition not of the donee of a power but of such persons as shall be competent to declare uses of the other estate to which reference is made. The two cases seem to me incapable of discrimination. A limitation to A. for life and after his death as B. shall appoint is good. That is a general power. A limitation to A. for life and after his death as B. shall appoint among the children and remoter issue of A. is good if and to the extent that B. by his appointment does not exceed the rule against perpetuities. That is a special power. A limitation to A. for life and after his death to the uses to which the X. estate shall then stand limited is a limitation under which the determination of those uses is delegated to such persons as shall be competent to declare uses of the X. estate. How does this for the present purpose differ from the case of a power? The learned judge decided the case upon the authority of *Lord Dungannon* v. *Smith*. (1) That was a case in which the limitations were known at the testator's death but, in an event, the person who was by those limitations indicated as the person to take might have remained unascertained beyond the time allowed by the rule against perpetuities. It was the ordinary case of known limitations and the possibility that in an event the person to take would be beyond the period

(1) 12 Cl. & F. 546.

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allowed. I cannot see how this bears upon the question where the case is, as here, that the limitations are not known at the testator's death, but are ascertained afterwards. *Lord Dungannon* v. *Smith* (1) is no authority for the proposition that uncertainty at the testator's death whether the limitations introduced by reference will exceed the rule or not is a ground for saying that the rule against perpetuities has been infringed.

I think the appeal succeeds.

HAMILTON L.J. The single question in this case is one which lies in a small compass. I have had the advantage of reading and considering the judgments that have just been read. I entirely agree with them and do not think I can usefully add anything to them.

Solicitors: *Ranken Ford, Ford & Chester; Lawrence, Graham & Co.*

W. I. C.

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[1912 D. 1037.]

London—Metropolis Management—Streets—Widening—Power to take Part of House—Wishes of Owner—Michael Angelo Taylor's Act, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

In order to justify the taking of part only of a house under the provisions of Michael Angelo Taylor's Act, the facts must be such that the local authority acting in a quasi-judicial capacity can honestly come to the conclusion that it is unnecessary to take the whole. Such a conclusion cannot be come to where the taking of the part in question will destroy the house as a house. The fact that by reconstruction the mutilated carcase may be converted into a house even of substantially the same character as before is immaterial, inasmuch as the owner cannot be compelled to effect such a reconstruction.

There is no reason for confining the meaning of the word "necessary" in s. 80 of the Act to physical necessity. The wishes and intention of the owner as well as the physical condition of the house may be circumstances to be taken into account by the local authority in making their adjudication.

Statement of Buckley J. in *J. L. Denman & Co., Ld.* v. *Westminster Corporation* [1906] 1 Ch. 464, 478, adopted and followed.

WITNESS ACTION.

This was an action for an injunction to restrain the defendants

(1) 12 Cl. & F. 546.

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from proceeding with a notice to treat dated March 19, 1912, to take part only of certain premises known as the Green Dragon public-house, Nos. 56 and 57, Fleet Street, in the city of London, for the purpose of widening that street. The notice to treat was served on the plaintiffs under Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.).

The plaintiffs objected to the notice to treat on the ground that if the defendants were allowed to proceed with the notice and to take part only of the premises comprised in it they would destroy the business carried on there and the existing user of the remainder of the premises, and that the parts of the premises not comprised in the notice would not be a house or building capable of being used in the same manner as hitherto and with substantially the same result and convenience, and that so much of the premises would be taken as to render it necessary to make structural alterations in the rest of the house in order to adapt it to a different kind of business and user or one of a more limited nature.

The facts as found by Warrington J. were as follows. In November, 1909, the defendants resolved to widen Fleet Street, and the Court of Common Council by formal resolution adjudged that part of the houses therein mentioned, including Nos. 56 and 57, projected into, obstructed, and prevented them from widening the street, and that the purchase of part of such houses and of the land whereon the same stood would be necessary for such purpose. Pursuant to this resolution the defendants gave the plaintiffs a notice to treat dated March 19, 1912, for a strip of land with the buildings thereon, 8 ft. 2 in. wide at one end and 9 ft. 11 in. wide at the other end, being, in fact, the front of the houses towards Fleet Street. The plaintiffs objected to the taking of part of the houses, and on July 18, 1912, issued the writ in the present action, claiming an injunction restraining the defendants from proceeding on their notice to treat.

The houses in question with the back premises were situate on the south side of Fleet Street, between that street on the north and Pleydell Street on the south. They now formed, in fact, one house. It was a building consisting of a basement, ground floor, and several upper floors; in the front part these were five in

number, in the back part three. The whole of the basement and ground floor (except so much thereof as was occupied by the passage and staircase hereinafter mentioned) and the back portion of the remainder were occupied and used as a public-house, known as the Green Dragon. The first, second, third, and fourth floors of the front portion were let off as offices, and the fifth floor was used as a caretaker's lodging. The first floor was reached from the street through a doorway leading to a short passage, and thence by a staircase.

The removal of the strip in question, if nothing more were done, would destroy the identity of the building as a house. Besides involving the demolition of the front wall it would result in the cutting off of the staircase before mentioned and a considerable diminution in the size of all the front rooms, some of which, even if the front wall were rebuilt, would cease to be of any use at all as rooms, and others, and in particular the cellar, would be practically useless for the purposes for which they had hitherto been used. But by the expenditure of a sum estimated at between 2000*l.* and 3000*l.* the house might be so reconstructed as to be again made suitable for a purpose similar to that for which it had hitherto been used, but not as regards the upper floors, at all events, for the same purposes, inasmuch as the alteration in the size and arrangements of the various offices would be such that it was doubtful if they could be let to the same class of tenants as those to whom the existing rooms were let.

The plaintiffs were mortgagees in possession under leases of the front and back portions of the house for different terms and under different lessors. The front portion was held under a lease granted by one Daish for a term expiring in 1955, and the back portion under one granted by St. John's College, Oxford, for a term expiring in 1977 On the determination of the lease expiring in 1955 the lessees were under covenant to divide off the front from the back premises.

The present freeholder of the front portion of the premises had delivered particulars of her claim for the portion of the property required and had raised no objection to the validity of the notice to treat.

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H. Terrell, K.C., and *Courthope-Munroe*, for the plaintiffs. The defendants are not entitled to proceed with their notice to treat. The result of the cases is that in order to justify the local authority in taking part only of a building the part proposed to be taken must be in the nature of an excrescence. If a substantial part of the building is proposed to be taken so that the use of the building is substantially injured and it can no longer be enjoyed as before the local authority must take the whole: *Gibbon* v. *Paddington Vestry* (1); *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (2); *Green* v. *Hackney Corporation* (3); *Wild* v. *Woolwich Borough Council* (4): *Aldis* v. *London Corporation* (5); *Thompson* v. *Hammersmith Corporation*. (6) The evidence in the present case shews that if the proposed strip is taken the identity of the building as a house will be destroyed. In *J. L. Denman & Co., Ld.* v. *Westminster Corporation* (7) Buckley J. points out that, whether or not the power of the local authority to take the whole of a house ought to be measured by the wishes of the owner, the attitude which he takes up ought not to be disregarded. [They also referred to *Pulling* v. *London, Chatham and Dover Ry. Co.* (8) and *Finck* v. *London and South Western Ry. Co.* (9)]

Cave, K.C., and *W. E. B. Henderson*, for the defendants. If the notice to treat is acted upon and a slice as proposed is taken off the premises, the premises can be altered so as to answer the purposes for which they are now used. It is a question of degree in each case whether the reconstruction amounts to a rebuilding. Having regard to the reported cases a local authority taking property in London are placed in a serious difficulty in proceeding under Michael Angelo Taylor's Act. They have to adjudicate as to the amount of the property in question it is necessary for them to take for the purposes of the widening. The cases have laid down that if they require only a part of the premises and adjudicate that the whole is

(1) [1900] 2 Ch. 794, 802.
(2) [1894] 2 Q. B. 742.
(3) [1910] 2 Ch. 105.
(4) [1910] 1 Ch. 35, 41.
(5) [1899] 2 Ch. 169.
(6) [1906] 1 Ch. 299.
(7) [1906] 1 Ch. 464, 478.
(8) (1864) 3 D. J. & S. 661.
(9) (1890) 44 Ch. D. 330, 349.

necessary they act ultra vires: *Gard* v. *London Commissioners of Sewers*. (1) In the present case the defendants only require a strip. If therefore it is ultra vires for the authority to give notice to treat for the whole if they only require a part it is difficult to see how the Court can compel them to take the whole.

The line of authorities on which the plaintiffs rely are inconsistent with that relied on by the defendants and the Court has to choose between the two lines. The defendants gave a notice to treat for a portion of the premises both to the freeholder and to the plaintiffs. The freeholder delivered particulars of her claim for the portion required and there is therefore a contract. The plaintiffs objected to the notice to treat. Under these circumstances the Court will not require the defendants to purchase the freehold interest in the strip and the leasehold interest in the whole. *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (2) and *Aldis* v. *London Corporation* (3) shew that where a landowner desires to retain a part the local authority cannot insist upon taking the whole unless the remainder will be useless. Whether what is left is a house is a question of fact: *J. L. Denman & Co., Ld.* v. *Westminster Corporation*. (4) Here the evidence shews that with certain repairs what would be left after taking the strip would be a house and capable of being used for the purposes for which the premises are now used. The defendants having bona fide arrived at the conclusion that all they require for widening the street is the strip in question, the Court will not, it is submitted, interfere. The duty imposed on the authority by s. 80 of the Act is one which they may know before service of the notice to treat. It cannot differ according as the owner takes one view or another after the notice has been served.

[WARRINGTON J. May not the fact whether or not the owner desires to reconstruct what is left be one which the authority ought to take into account in making their adjudication?]

The authority may not then know who the owner is. [They also referred to *Pescod* v. *Westminster Corporation*. (5)]

H. Terrell, K.C., in reply. It is impossible to distinguish the

(1) (1885) 28 Ch. D. 486, 494.
(2) (1885) 30 Ch. D. 642.
(3) [1899] 2 Ch. 169.
(4) [1906] 1 Ch. 464.
(5) [1905] 2 Ch. 475.

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present case from *Gibbon* v. *Paddington Vestry* (1) and *Green* v. *Hackney Corporation.* (2) The test is whether when the part is taken away substantially a house will remain. If it will not, then the authority must take the whole. The difficulty on the construction of s. 80 has arisen from reading into it the words "or any part thereof." It was first started in *Thomas* v. *Daw* (3), where Lord Chelmsford L.C. thought that if the authority took the whole they would have to throw it into the road. It is not the duty of the Court to reconcile the two conflicting lines of decisions.

Cur. adv. vult.

Feb. 24. WARRINGTON J. The question in this case is whether the defendants, the Corporation of the City of London, are under the provisions of the Act 57 Geo. 3, c. xxix., commonly known as Michael Angelo Taylor's Act, entitled to acquire compulsorily a part only of certain houses, numbered 56 and 57, Fleet Street, for the purpose of widening that street. [His Lordship stated the facts as above set forth, and continued:] The freeholder of the front portion of the premises has made a claim on the footing of the notice to treat, in other words, is ready to sell the part without the whole. It is contended that this is a material circumstance telling against the plaintiffs' claim. I cannot myself see this. I have only to deal with the question whether the plaintiffs can be compelled to sell their interest, not with the position of the freeholder.

The powers of the defendants are derived from Michael Angelo Taylor's Act, ss. 80 and 82. Sect. 80 so far as it is material for the present purpose is in the following terms: "it shall and may be lawful to and for the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district, from time to time and at all times hereafter to . . . . widen any of the streets . . . . within any parochial or other district; . . . . and if any houses, walls, buildings, lands, tenements and hereditaments, or any part thereof, shall be adjudged by the said commissioners or trustees or other persons as aforesaid to

(1) [1900] 2 Ch. 794. (2) [1910] 2 Ch. 105.
(3) (1866) L. R. 2 Ch. 1.

project into, obstruct or prevent them from so . . . . widening the said streets . . . . and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements or hereditaments will be necessary for that purpose, it shall and may be lawful to and for the said commissioners, &c., and they shall have full power and authority, to treat, contract and agree . . . . with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands and hereditaments . . . . for the purposes aforesaid, and to pay for the same such sum and sums of money as shall be agreed upon by the said commissioners, &c., and the owner or owners, occupier or occupiers thereof . . . . and to pull down, use, sell or dispose of such houses, walls and buildings, and the materials thereof, and lay the sites thereof, and also such other lands, tenements, or hereditaments, or so much thereof as they the said commissioners, &c., shall think proper, into the said streets." Sect. 82 contains provisions for summoning a jury to inquire into the value of the houses, buildings, lands, tenements, and hereditaments and to assess and award the sum to be paid for the purchase thereof. It cannot, in my opinion, be held, at any rate in a Court of first instance, that under no circumstances is it competent to the authority to adjudge that the purchase of a part only of a house is necessary for the purpose of the widening. That it may be competent for the authority to make such an adjudication if the facts are such that the conclusion can honestly be justified seems to me to follow from the judgments of Lord Chelmsford in *Thomas* v. *Daw* (1) and of the Court of Appeal in *Gard* v. *London Commissioners of Sewers* (2) and of the Divisional Court of the Queen's Bench Division in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington.* (3) But in order to justify the taking of a part only the facts must be such that persons acting in a quasi-judicial capacity can honestly come to the conclusion that it is unnecessary to take the whole.

Can such a conclusion be come to where, as in the present case, the taking of the part in question would destroy the house as a house? In my opinion it clearly cannot. It is needless

(1) L. R. 2 Ch. 1. (2) 28 Ch. D. 486.
(3) [1894] 2 Q. B. 742.

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to do more than refer to the judgments of Cave J. and Collins J. in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1) and the judgment of Stirling J. in *Gibbon* v. *Paddington Vestry.* (2) Cave J. said this (3): "You may divide a piece of land and make it two pieces of land, and each is land for all purposes; but you cannot divide a house and make of it two houses; you get something which is not a house. If you take half of a building occupied as a tavern, you do not take a tavern and leave a tavern; you take part of a whole thing, and leave the other part of the whole thing for the previous owner of the whole. So far as I can see, the Act does not contemplate that that shall be done; it does not contemplate that part of a house may be taken in the sense that the owner shall be left with something which is not a house, which cannot be used for the purpose for which the house was used before, and which is essentially different in its character and condition from what the house was before. If that were the case made out here, I should be clearly of opinion that the Act of Parliament did not enable a portion of the house in that sense to be taken, and that the whole house must be taken by the vestry." Collins J. said this (4): "There must however, I think, be the distinction in point of fact which has already been pointed out between land and a house. Land is by its nature capable of being divided; a house is prima facie a unit incapable of division; but there are cases in which it would be impossible to say that a portion of a house might not be cut off without destroying the identity of the house itself. If a particular part of a house can be pointed to which the vestry, bona fide, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say that there is nothing to prevent the vestry from compulsorily taking that part only. If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed, is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a

(1) [1894] 2 Q. B. 742.
(2) [1900] 2 Ch. 794.
(3) [1894] 2 Q. B. 749.
(4) [1894] 2 Q. B. 754.

house, then I think the vestry are not entitled to say that 'part thereof' only obstructs, or that 'part thereof' only is necessary to be removed for the purpose of the improvement. Under these circumstances, I am of opinion that the vestry could not stop short of taking the whole." Stirling J. in *Gibbon* v. *Paddington Vestry* (1) sums up the result in the following terms: "in the construction of this Act a limitation is to be placed on the word 'part.' If a local authority desire to take part of a house, the portion taken must be something which can fairly be called a 'part.' If, for example, there is a porch or a conservatory, or a cellar, which can be removed without substantially destroying the house as a house, that, according to the decision"—i.e., in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (2)—"may be taken; but if, on the other hand, a substantial portion is taken by the authority, so that the use of the house is substantially injured and can no longer be enjoyed as it was before, then it seems to me that it is laid down that the whole must be taken."

The fact that by a reconstruction the mutilated carcase may again be converted into a house even of substantially the same character as before seems to me to be immaterial. The owner cannot be compelled to effect such reconstruction. He may not have the means to do it and he may not be willing to run the risk of a sufficient sum being awarded by the jury to cover the outlay. In my opinion the adjudication in question was not one which could properly be made, and the plaintiffs are entitled to prevent the defendants from taking the part of the house mentioned in the notice to treat.

It has been said that there is another line of cases with which those I have referred to cannot logically be reconciled; I mean thoses cases in which it has been held that an owner is entitled to require the authority to take a part only where what is left can be rendered useful as a house and the owner is desirous of retaining it. Examples of such cases are *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (3), *Aldis* v. *London Corporation* (4), and *J. L. Denman & Co., Ld.* v. *Westminster Corporation.* (5) It is

(1) [1900] 2 Ch. 802.
(2) [1894] 2 Q. B. 742.
(3) 30 Ch. D. 642.
(4) [1899] 2 Ch. 169.
(5) [1906] 1 Ch. 464.

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perhaps needless in the present case to say anything about these other cases, but it may be well if I express my view.

I myself see no inconsistency in the two classes of decision if care is taken not to lose sight of the words of the Act. The authority has to adjudicate that the purchase of the whole or a part is necessary for the widening. I see no reason for confining the meaning of the word "necessary" to physical necessity. It may be necessary to take the whole if the owner will not rebuild; it may be unnecessary if he will, and if the house so rebuilt will be substantially useful. In other words, the wishes and intention of the owner as well as the physical condition of the house may be circumstances to be taken into account by the authority in making its adjudication. I think the same view is expressed in different language by Buckley J. in *Denman's Case.* (1) He says this: "In *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (2), and *Aldis* v. *London Corporation* (3), there is authority for saying that, where the landowner desires to retain part, the local authority cannot insist on taking the whole unless the remainder will be useless. There is, however, great difficulty in saying that the power of the local authority is to be determined by ascertaining ex post facto what the landowner desires, and the more so if the owner who expresses the wish is a limited owner. One limited owner might take one view and another another view. The freeholder might wish the whole to be taken; the leaseholder might wish to keep part. Upon this part of the case I do not rest my decision upon any principle to be deduced from those cases, to the effect that the power of the local authority is measured by the wish of the owner. But I think that the attitude which the owner takes up is not to be disregarded. The question to be decided is whether that which will be left will be a house. If the owner whose estate is in possession is desirous of doing upon his own land such work, by way of shoring and reconstruction, as that that which will be left will be a house, I think regard ought to be had to that fact. Under such circumstances the local authority in demolishing part will be leaving that which, having regard to the acts which the owner desires

(1) [1906] 1 Ch. 478. (2) 30 Ch. D. 642.
(3) [1899] 2 Ch. 169.

to do, will be a house available for him as a house. In every case where part of a house is demolished (say a porch or a cellar) some reconstruction will be required. The question cannot, therefore, I think, be answered by saying that the thing left will require some reconstruction before it will be complete as a house. The question is one of degree. Will there be so much left that a house will be left? In answering that question regard is, I think, to be given to the fact that the owner is willing to do what is necessary to make that which remains an effectual house."

The plaintiff is entitled to the injunction claimed and to the costs of the action.

Solicitors: *A. E. Sydney; The City Solicitor.*

W. I. C.

ETHERIDGE *v.* CENTRAL URUGUAY NORTHERN EXTENSION RAILWAY COMPANY, LIMITED.

[1913 E. 59.]

Company—Sale of Undertaking and Assets in Consideration of Shares in Purchasing Company—Distribution of Proceeds—Power in Memorandum of Association—Resolutions—Special Resolution—Dissentients—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 192.

A company which has power under its memorandum of association to sell all or any part of its business or property to another company in consideration of shares in that company, and also power to distribute such shares among its own members, does not fulfil the requirements of s. 192, sub-s. 1, of the Companies (Consolidation) Act, 1908, by passing merely an ordinary resolution sanctioning such a sale and special resolutions providing for voluntary liquidation and the mode of distribution of the compensation shares.

To comply with s. 192, sub-s. 1, there must at least be a special resolution authorizing the liquidator to accept shares as the consideration for the sale. In the absence of such a special resolution there would be no special resolution to which the provision relating to dissentients in sub-s. 3 of s. 192 could apply.

Semble, that a special resolution passed on a show of hands—no poll being demanded—by a three-fourths majority, as provided by s. 69 of the Act, and subsequently confirmed, is sufficient to satisfy the requirements of s. 192 and validate the sale, notwithstanding a provision in

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the company's articles of association that every special resolution should, unless resolved on without a dissentient, be decided by poll.

Bisgood v. *Henderson's Transvaal Estates, Ld.* [1908] 1 Ch. 743, applied.

MOTION for an injunction to restrain the defendants from acting upon or giving effect to three resolutions purporting to have been passed at an extraordinary general meeting of the defendant company the Central Uruguay Northern Extension Railway Company, Limited (hereinafter called "the company"), and, as to two of them, subsequently confirmed as special resolutions.

The resolutions were as follows: (1.) "That the railway undertaking and assets of the company be sold to the Central Uruguay Railway Company of Monte Video Limited upon the terms set forth in a provisional agreement dated December 10, 1912, and made between the company of the one part and the Central Uruguay Railway Company of Monte Video Limited of the other part subject to such modification as the directors and the liquidator may approve." (2.) "That the company be wound up voluntarily" and nominating and appointing a liquidator, and (3.) "That the fully paid 'Northern' shares of 10*l.* each in the capital of the Central Uruguay Railway Company of Monte Video Limited forming part of the consideration for the sale of the railway and undertaking of the company be distributed amongst the members of the company in the proportion of one of such 'Northern' shares for each share in the capital of the company held by them respectively."

The Central Company and the Northern Company were English joint stock companies and the directors of the two companies were identical. The capital of the Northern Company was 1,000,000*l.* divided into 100,000 shares of 10*l.* each, all issued and fully paid, and the company had also created and issued 627,150*l.* 5*l.* per cent. permanent debenture stock. The Northern Company was registered on October 26, 1888.

The agreement referred to in the first resolution was provisional (1.) upon the Central Uruguay Company passing and confirming a special resolution increasing its capital by the creation of 100,000 shares, to be called "Northern" shares and

to entitle the holders to certain specified rates of dividend, and (2.) upon the Northern Company passing and confirming a special resolution for voluntary liquidation. The consideration for the sale and transfer of the undertaking and assets of the Northern Company was to consist of (*a*) the sum of 1,000,000*l.* to be paid and satisfied by the allotment to the Northern Company of the 100,000 "Northern" shares of 10*l.* each in the Central Company, (*b*) the issue to the holders of debenture stock of the Northern Company of a like amount of debenture stock of the Central Company, and (*c*) the payment and discharge by the Central Company of the debts and liabilities of the Northern Company.

The meeting of the Northern Company to which the above-mentioned resolutions, the subject of this motion, were submitted was held on December 17, 1912, and was convened by a merely formal notice dated December 6, accompanied by a circular of even date explaining the course proposed. Neither the notice nor the circular contained any reference to s. 192 of the Companies (Consolidation) Act, 1908. The notice merely stated that the meeting would be held on December 17, 1912, for the purpose of considering and if thought fit passing the resolutions in question, which were set out in the notice, and that a further extraordinary general meeting would be held on January 2, 1913, for confirming, if thought fit, as special resolutions the second and third above-mentioned resolutions.

The proposed sale involved the exercise by the Northern Company of an option to renounce the benefit of and liability under a certain guarantee given by the Government of Uruguay, which option had to be exercised before December 31, 1912. The first resolution was therefore put forward as an ordinary resolution only because there was not sufficient time remaining to permit of its being passed and confirmed as a special resolution if the option was to be duly and effectively exercised before December 31, 1912.

The plaintiff, who was the holder of or beneficially entitled to 1344 10*l.* shares in the Northern Company, objected to the proposed sale on the ground that the terms offered were not sufficiently advantageous to the shareholders in that company.

At the meeting held on December 17, 1912, the first resolution

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was put to the meeting and, notwithstanding the opposition of the plaintiff and those supporting him, was carried on a show of hands. The plaintiff thereupon asked whether he might demand a poll, to which the chairman replied that it would be waste of time to go to a poll as he held proxies in respect of 39,453 shares while the plaintiff had proxies for approximately 7000 shares, and no poll was in fact demanded or taken. The second resolution was subsequently put to the meeting and declared by the chairman to be carried by a large majority. The third resolution was also similarly carried. The majority for the second and third resolutions was a three-fourths majority as provided by s. 69 of the Companies (Consolidation) Act, 1908, in the case of a special resolution, and these two resolutions were duly confirmed at a further meeting held on January 2, 1913.

On January 9 the Northern Company's solicitors wrote to the plaintiff's solicitors a letter (fully stated in his Lordship's judgment) offering to purchase the plaintiff's interest at a price to be determined by agreement or arbitration in manner provided by s. 192. The plaintiff did not avail himself of this offer, and on January 15 commenced this action on behalf of himself and all other shareholders in the Northern Company impeaching the sufficiency and validity of the proceedings, and now moved for an interlocutory injunction as above stated.

The memorandum of association of the Northern Company among other corporate objects of the company conferred upon the company the power of "selling to any company or person all or any part of the company's business or property; and for all or any of the said purposes, if necessary, establishing any new company; and taking shares in any such new or other company as partial or entire payment or consideration; and holding or selling such shares, or distributing or allotting them among the shareholders of this company."

Article 50 of the company's articles of association provided as follows: "Every special resolution, and every question required by these presents to be decided by any other than a simple majority of the shareholders personally present at a

general meeting, shall, unless resolved on without a dissentient, be decided by poll."

Gore-Browne, K.C., and *A. Richardson*, for the plaintiff. We submit that inasmuch as the first resolution relating to the sale of the undertaking and assets of the Northern Company was not a special resolution, and as the second and third resolutions, being special resolutions, were not carried as such according to the company's articles, the whole transaction is impeachable and invalid.

In the first place, the sale proposed by the first resolution falls within the express terms of s. 192, sub-s. 1, of the Companies (Consolidation) Act, 1908, for the Northern Company was proposed to be wound up and the whole of its business was proposed to be transferred in consideration of shares in the transferee company, and in those circumstances the section requires the sale to be sanctioned by a special resolution. The first resolution was an ordinary, not a special, resolution, and was therefore insufficient under s. 192.

Bisgood v. *Henderson's Transvaal Estates, Ld.* (1), overruling *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (2), made it clear that a scheme to get rid of the whole undertaking and assets of a company must come strictly within s. 161 of the old Act of 1862, for which s. 192 of the Act of 1908 has been substituted, and requires a special resolution.

The agreement for sale in this case was only to come into operation after the company had gone into liquidation, so that in point of fact there never was an interval of time at which the directors could have made a sale. That brings the case in every respect within s. 192, under which the liquidator has no power to accept shares except by special resolution, and there was none such. So that, quite apart from *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (1), this sale was bad under s. 192. If the directors had tried to sell for shares while the company was a going concern, then *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (1) would have applied.

With regard to the second and third resolutions, the

(1) [1908] 1 Ch. 743. (2) [1892] 3 Ch. 454.

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declaration by the chairman that they had been carried by a large majority involves that there was an opposition, and that being so, article 50 applies and a poll should have been taken. That was not done, and there was in fact no special resolution within the requirements of the articles. If the chairman's own declaration shews that the resolution could not have been duly carried, he cannot by adding "and therefore I declare it carried" make it what it is not: *In re Caratal (New) Mines, Ld.* (1)

Further, we submit that the notices summoning the meetings were insufficient and did not give fair notice of the facts, or that it was proposed to proceed under s. 192: *Tiessen* v. *Henderson* (2); *Kaye* v. *Croydon Tramways Co.* (3); *In re Irrigation Co. of France.* (4)

Younger, K.C., and *Bischoff*, for the defendants. So far as this is a case of substance it is based on the assumption that the sale is invalid because it was not sanctioned by a special resolution, and reliance was placed upon the decision in *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (5), but in that case nothing that the company could have done by special resolution could have made good what was proposed to be done, because it was ultra vires altogether. The present case is unique because an offer has been made to the plaintiff to buy him out as a dissentient and has been refused.

There was no necessity for the first resolution to be a special resolution. It had nothing whatever to do with s. 192. It merely gave the directors authority to carry out the sale, and made no provision for the distribution of the proceeds. *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (5) did not decide that the directors might not sell but only that they could not by one transaction sell and distribute. This company's memorandum of association confers power to sell the company's business and property, and that is one of the powers exercisable by the company in general meeting, and this contract for sale is entered into by the company by virtue of its own powers. *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (5) was the case of a sale and

(1) [1902] 2 Ch. 498.
(2) [1899] 1 Ch. 861.
(3) [1898] 1 Ch. 358.
(4) (1871) L. R. 6 Ch. 176.
(5) [1908] 1 Ch. 743.

distribution, not of a sale alone, and the distribution of the assets is the key of the whole question. There was nothing in that case inconsistent with *Mason* v. *Motor Traction Co.* (1), in which the agreement for sale of the company's assets for partly paid shares was not under s. 161, but under the company's own memorandum of association in exercise of its powers. In this case an ordinary resolution sanctioning the sale was all that was required.

Further, with regard to the second and third resolutions, we submit that it is the reception of the proceeds, and not the sale itself, which is dealt with by s. 192. The authority under that section is "to receive" the compensation shares "for distribution." Therefore when a sale for value has been carried out by the company under its corporate powers, then s. 192 comes into operation on the reception of the proceeds for the purposes of distribution, and the second and third resolutions having been duly passed, all has been done that was necessary to be done.

That the second and third resolutions were duly passed in this case is a question of form and not of substance. A poll was not taken because the result was a foregone conclusion, the directors holding sufficient proxies. These two resolutions were passed by a majority sufficient to satisfy the requirements of s. 69 of the Act of 1908 for a special resolution which is a statutory thing, coming under the section and not under the company's articles. Under s. 69, sub-s. 3, the declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence: *Arnot* v. *United African Lands, Ld.* (2); *In re Horbury Bridge Coal, Iron and Waggon Co.* (3) The non-taking of the poll was simply the abandonment of a mere formality, and for that the Court will not upset the whole transaction, the plaintiff having been offered compensation: per James L.J. in *In re Irrigation Co. of France.* (4)

Gore-Browne, K.C., in reply. Sect. 69 of the Act of 1908 does not override article 50. The effect of refusing to grant a poll was

(1) [1905] 1 Ch. 419.
(2) [1901] 1 Ch. 518.
(3) (1879) 11 Ch. D. 109.
(4) L. R. 6 Ch. 176, 185, 186.

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considered in *Reg.* v. *Wimbledon Local Board* (1), which shews that the demand of a poll is a right at common law.

Cur. adv. vult.

Feb. 25. JOYCE J. The question arising for determination in this case is whether certain resolutions purporting to authorize the sale for shares and debentures of the whole business and property of the Northern Extension Railway Company were validly passed and sufficient to confer the requisite authority upon the voluntary liquidator to carry out such sale.

The action is by a shareholder, Mr. Etheridge, on behalf of himself and all other the shareholders in the Northern Company, I ought to say except the defendants hereto, disputing the sufficiency and validity of the proceedings, that is, the resolutions that have been passed for the purpose of authorizing such sale. The meeting of the company to which the resolutions were submitted was held on December 17 last, and it was convened by a notice dated December 6. The notice was merely formal, and the resolutions were (1.) "That the railway undertaking and assets of the company be sold to the Central Uruguay Railway Company of Monte Video Limited upon the terms set forth in a provisional agreement dated December 10, 1912, made between the company of the one part and the Central Uruguay Railway Company of Monte Video Limited of the other part, subject to such modification as the directors or the liquidator of the company may approve." No. 2 was "That the company be wound up voluntarily," and appointing a liquidator. No. 3 was "That the fully paid 'Northern' shares of 10*l.* each in the capital of the Central Uruguay Railway Company of Monte Video Limited forming part of the consideration for the sale of the railway and undertaking of the company be distributed amongst the members of the company in the proportion of one of such 'Northern' shares for each share in the capital of the company held by them respectively." This notice was accompanied by a circular of even date purporting to explain or give the reasons for the course that was proposed.

The very same persons were directors of the two companies,

(1) (1882) 8 Q. B. D. 459.

each having considerable, not identical, interests in each company, and the same I believe was the case, and must have been the case, with many other shareholders. There is no imputation of fraud or personal misconduct. The plaintiff says that the defendants, that is, the personal defendants, are all honourable men, but that better terms might have been obtained; that the plaintiff and his supporters have not been treated with perfect candour and fairness, and that the proceedings adopted when the resolution was passed, notwithstanding his opposition and the opposition of those who supported him, do not validly authorize the sale and transfer.

As I have said, the notice convening the meeting was merely formal, and I think I am right in saying that neither it nor the accompanying circular referred in any way to s. 192 of the Act, as to which I may cite a passage in Lord Justice Buckley's book on the Companies and Limited Partnerships Acts, 9th ed. at p. 436: "The notice convening the meeting, at which the resolution under this section"—that is, of course, s. 192—"is to be submitted, must give the shareholders distinctly to understand that it is under this section that it is proposed to proceed"; and the authority given for that, among others, is a passage in the judgment of Mellish L.J. in *In re Irrigation Co. of France.* (1) It is further contended that the notice was not sufficiently explicit on other matters such as those referred to in the observations of the judge in *Tiessen* v. *Henderson.* (2) The shareholders were not before the meeting made acquainted with the actual terms of the agreement, and there is some difference of opinion as to the extent to which copies, if any, of the agreement were produced at the meeting. It is said, probably truly, that inspection was offered, but, at all events, little if any opportunity was afforded for the consideration of the terms. One most important circumstance, so far as I understand the case, was never pointed out, not even, I think, at the meeting, namely, that the agreement under its express terms was not to become binding or to take effect unless or until, among other things, the company passed and duly confirmed a special resolution for the voluntary winding up of the company.

(1) L. R. 6 Ch. 176, 193. (2) [1899] 1 Ch. 861.

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At the meeting of December 17 the first resolution was carried, notwithstanding the opposition of the plaintiff and those who supported him. The second and third were also carried, and by the requisite majority, that is to say, not less than three-fourths, as provided by s. 69 of the Act. There was some talk about a poll. In the end a poll was not demanded and as a matter of fact no poll was taken at the meeting. A further meeting was held on January 2 to confirm the second and third resolutions, which were then passed by an ordinary majority.

On January 9 the defendants' solicitors, being, no doubt, much exercised in their minds about the provisions of s. 192 of the Act, wrote to the plaintiff's solicitors as follows: "We understand from the liquidator that up to to-day, the date by which formal notice of dissent under section 192 of the Companies Consolidation Act would have had to be served, he has received no communication from your client, Mr. Etheridge, since the conclusion of the poll. As your client knows there neither was nor is any desire on the part of the company to coerce dissentients, either by means of the procedure adopted or otherwise, into accepting their rateable proportion of the new Northern shares. If, therefore, we hear from you on or before the 13th inst. that your client would like his interest purchased at a price to be determined by agreement or by arbitration in manner provided by section 192, we shall be pleased to advise the liquidator to meet his wishes, any technical failure to comply with that section being waived."

Now just let me refer to s. 192, because I confess that I find it difficult to see how s. 192 can be applied to these resolutions or any of them. Section 192, sub-s. 1, provides, reading it shortly, that "where a company is proposed to be wound up altogether voluntarily, and the whole of its business or property is proposed to be transferred or sold to another company, the liquidator"—that is, the liquidator of the selling company—"may, with the sanction of a special resolution of that company, receive in compensation or part compensation for the transfer or sale shares for distribution among the members of the transferor company"; in other words, may sell for a consideration wholly or in part consisting of shares. I agree that the word "sell" is not there used, because the liquidator gets his power to sell

under a previous section of the Act, namely, under sub-s. 4 of s. 186. But a special resolution may authorize him to receive a consideration wholly or in part in shares. Then sub-s. 3 of s. 192 is: "If any member of the transferor company who did not vote in favour of the special resolution . . . expresses his dissent," certain consequences follow which we all know.

Now I ask, to which of the three resolutions in this case does this s. 192 apply? The only resolution to which it applies, if you look at sub-s. 3, is a special resolution. What is the special resolution there referred to? It appears to me to be the special resolution referred to in sub-s. 1, which is the special resolution authorizing the liquidator to receive shares in part payment for the sale; in other words, the special resolution which in effect authorizes a sale wholly or in part for shares in the purchasing company. No such special resolution as that has been passed in the present case.

Before January 14 some industrious person looking into the matter on behalf of the plaintiff seems to have made a discovery, and it was this, that among the company's articles of association there is a rather singular one, No. 50, whereby it was provided that "Every special resolution, and every question required by these presents to be decided by any other than a simple majority of the shareholders personally present at a general meeting shall, unless resolved on without a dissentient, be decided by poll"; in other words, in order to pass a special resolution there must be a poll, whether demanded or not. I do not think, as far as I can see, that it would have made any material difference in the result if the voting at the meeting of December 17 had been taken by poll, and I think upon the whole, though, indeed, it is not necessary for me to decide, that this omission did not invalidate the resolution, seeing that the course of procedure expressly indicated by s. 69 of the Act was followed with regard to these special resolutions.

The action was instituted on January 15, and notice of motion was given on the same day. There is some subsequent amendment and further notice of motion, and then it appears that not until January 22, and this seems to me almost incredible, were the plaintiff or his solicitors able to obtain any copy of the agreement.

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This case as it stands raises a very serious question. It is beyond doubt a case in which a company was proposed to be wound up altogether voluntarily, and the whole of its business and property was proposed to be transferred or sold to another company, and it was proposed, and the bargain was, that in part compensation for the transfer or sale shares or other interests should be received from the transferee company for distribution amongst the members of the transferor company. I think the precise facts were that a million was received in shares and the rest in debentures of the Central Uruguay Company. Now the plaintiff says that in those circumstances what was proposed to be done could not be validly done unless it was authorized by a special resolution under s. 192 of the Act. The defendants say that it could, and they refer to the memorandum of association, which confers, among other powers, the power "to sell to any company or person all or any part of the company's business or property, and for all or any of the said purposes if necessary to establish any new company and take shares in any such new or other company as partial or entire payment or consideration"—and not stopping there—"and hold or sell such shares or distribute or allot them among the shareholders of this company." The defendants in effect say that the memorandum and articles, and, indeed, the memorandum of association, contain sufficient authority without any winding-up or special resolution to transfer the whole business or property for shares in the purchasing company. If that argument were sound I do not see why the memorandum should not also authorize a distribution or allotting of the shares amongst the shareholders of the selling company. However, their argument is that such a sale can be validly sanctioned by an ordinary resolution, and that this would suffice if there be a voluntary winding-up, and if the mode of the distribution of the shares, and that only, be sanctioned by a special resolution. That is not, to my mind, what the Act says, or anything like it, and having regard to the terms of s. 192 and the authorities cited to me, especially *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (1), I am unable to concur in the view put forward on behalf of the

(1) [1908] 1 Ch. 743.

defendants. If the resolution spoken of in sub-s. 3 of s. 192 can be split into two parts, as it probably might, and if both were passed as special resolutions, I think that there must at least be a special resolution authorizing the liquidator to accept shares as the consideration or as part of the consideration for the sale, or, in other words, to sell the whole of the company's property and assets, a winding-up being contemplated, in consideration of shares and debentures. I think this cannot be done except under the powers conferred, and with the sanction prescribed by s. 192. In other words, in my opinion, as at present advised (this is not the trial of the action), resolution No. 1 as passed, not being passed as a special resolution, was insufficient to confer the requisite authority. Of course, resolution No. 2 did not do it, and resolution No. 3, which merely prescribed how the shares should be distributed, is not, in my opinion, sufficient to confer the requisite authority under s. 192. I think the motion succeeds, and an injunction restraining the defendants from carrying out the sale on the terms of the agreement must go until the trial. That is all that I decide at present, and I say nothing about the liquidation.

[By consent of all parties the motion was treated as the trial of the action and ultimately the terms of a judgment were arranged and taken by consent.]

Solicitors: *Geo. & Wm. Webb; Bischoff, Coxe, Bompas & Bischoff.*

R. M.

SWINFEN EADY J.

1913

April 1.

THORNHILL *v.* WEEKS.

[1912 T. 938.]

Local Government—District Council—Public Right of Way—Assertion of Right by District Council—Threat and Intent to exercise Right by Servants or Agents—Action by Landowner for Declaration and Injunction—Reasonable Cause of Action—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.

If a district council, acting under s. 26 of the Local Government Act, 1894, assert that there is a public right of way over the plaintiffs' close and threaten and intend to exercise it by their servants or agents, an action for a declaration and injunction will lie against them.

Shafto v. *Bolckow, Vaughan & Co.* (1887) 34 Ch. D. 725, 728, applied.

Whether the mere assertion that there is a public right of way and the mere provision of legal assistance for the defence of private individuals, who prior to the assertion and without any reference to the district council have exercised the alleged right on their own behalf and been sued in trespass accordingly, would without more give rise to any cause of action against the district council, *quære*.

Motion.

On June 28, 1912, the plaintiff Thornhill, the owner of the Drayton Estate and Drayton Lodge, Barton Stacey, Hampshire, issued a writ against the defendants Weeks, French, and White (hereinafter called the original defendants) claiming an injunction to restrain them from trespassing on his carriage drive, park, yards and premises, and from breaking or injuring his gates, locks, and fences.

The original defendants, who were in a humble position of life, relied on an alleged public right of way from Andover High Road to Longparish along the carriage drive, through the yards and premises, and over the park.

On July 5, 1912, a meeting of the Andover Rural District Council was held at which resolutions from the Longparish and Barton Stacey Parish Councils asking the Andover Council to take steps to defend the action were read. The surveyor was directed to make inquiries into the matter and to report to the next meeting.

The original statement of claim was delivered on October 12, 1912, and alleged various acts of trespass and damage to the

gates, locks, and fences committed by the original defendants in the assertion of their alleged public right of way, which right of way was denied by the plaintiff Thornhill.

On October 25, 1912, the statement of claim was submitted to the Andover Council and it was resolved that the council should defend the action, and their clerk was directed to take all necessary steps for the defence.

On November 12, 1912, the defence of the original defendants was delivered by the Andover Council's solicitors, alleging the public right of way and admitting that the original defendants had abated certain obstructions in assertion of that right.

On January 30, 1913, the plaintiff Thornhill obtained leave to add Judd, a tenant of a portion of the carriage drive, as plaintiff and to amend accordingly, and on February 5, 1913, he obtained leave to add the Andover Council as defendants and to amend accordingly.

By their amended statement of claim delivered on February 27, 1913, the plaintiffs alleged the trespass and damage by the original defendants and claimed an injunction and damages. They also alleged that the Andover Council "in fact justify and approve the acts of the other defendants herein complained of and allege that such defendants are and were entitled to commit the same and also assert that there is a public right of footway over the premises in paragraph 4 hereinbefore mentioned. In accordance with such assertion the council on October 25, 1912, passed a resolution that the council should defend this action, and their clerk was directed to take all necessary steps for the defence. All such necessary steps have subsequently been taken pursuant to such resolution."

As against the Andover Council the plaintiffs claimed "a declaration that there is not any public right of way over or public footway upon the said carriage drive the said yards and grounds of Drayton Lodge and the said part of the park or on or over any part of the said premises and that the council may be restrained by injunction from asserting that there is a public right of way over or upon the said premises."

On March 15, 1913, the Andover Council issued a notice of motion under Order xxv., r. 4, and Order xvi., r. 11, asking that

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the statement of claim might be struck out as against them on the ground that it disclosed no reasonable cause of action and that the action might be dismissed as against them, or alternatively that the writ of summons and all subsequent proceedings in the action might be amended by striking out the name of the Andover Council as defendants.

Austen-Cartmell, for the Andover Council. We are acting under s. 26 of the Local Government Act, 1894.

Sub-s. 1 provides that it shall be the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way, where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district.

Sub-s. 3 provides that a district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally "take such steps as they deem expedient."

Sub-s. 4 provides that where a parish council have represented to the district council that any public right of way has been unlawfully stopped or obstructed, it shall be the duty of the district council, unless satisfied that the allegations of such representation are incorrect, to take proper proceedings accordingly.

Sub-s. 5 provides that any proceedings or steps taken by a district council in relation to any alleged right of way shall not be deemed to be unauthorized by reason only of such right of way not being found to exist.

As soon, therefore, as we became aware that the action involved the question of a public right of way it was our duty to protect the rights of the public, and this we were entitled to do by assisting the original defendants to maintain their defence: *Rex* v. *Norfolk County Council.* (1)

We did not, however, instigate any of the acts of the original defendants, and the mere fact that we have provided them with legal assistance and that we assert that there is a public right of way over the locus in quo does not give the plaintiffs

(1) [1901] 2 K. B. 268.

any cause of action against us. The mere assertion that there is a public right of way is at most slander of title, and apart from malice no action will lie. Of course if we followed up our assertion by authorizing acts of trespass we could be sued in trespass, but that we have not done.

[SWINFEN EADY J. You have asserted a public right of way. Are not the plaintiffs entitled to ask for a declaration and injunction against you? *Shafto* v. *Bolckow, Vaughan & Co.* (1)]

That was an action by a surface owner against mining lessees for causing a subsidence. The lessors justified the acts of the lessees under their proprietary rights and received the profits of the wrongful working. It was held that they were properly joined as defendants on the ground of their large interest in the matter of the suit, and on the ground that they claimed in substance the right to do the wrongful acts, i.e., by themselves or their lessees.

The present case is entirely different. The original defendants are not our servants or agents or in any way connected with us. They are simply members of the public. We have no proprietary interest in the matter, and we do not claim any right in our corporate capacity. We merely assert on behalf of the public that there is a public right of way. The only object of joining us is to get costs.

[SWINFEN EADY J. It is more than that. It will prevent you raising the same question in a fresh action. The observations of Chitty J. in *Shafto* v. *Bolckow, Vaughan & Co.* (1) are not confined to cases of proprietary right.]

We should practically be bound by the decision in the action against the original defendants, the issues being the same and the defence being admittedly maintained by us. A fresh action by us would be frivolous and vexatious. A declaration that there is no public right of way ought not to be made in the absence of the Attorney-General.

[SWINFEN EADY J. It will not bind him or the public, but that is no reason why it should not be made against you if you assert the right.]

We do not assert our own right, but the right of the public.

(1) 34 Ch. D. 725, 728.

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It is not suggested that we claim the right to use the way by our surveyor or our servants or agents. That completely distinguishes this case from *Shafto* v. *Bolckow, Vaughan & Co.* (1), *Hext* v. *Gill* (2), and *Tipping* v. *Eckersley*. (3) In the last case there was a threat to commit a breach of contract. The other cases were instances of claims to proprietary rights. In the present case we are merely performing our statutory duty under s. 26 of the Local Government Act, 1894, and have done nothing for which the plaintiffs can sue us.

[SWINFEN EADY J. Is there anything in the section exempting you from liability to a declaratory judgment?]

Not in terms. But surely we may perform our statutory duty of assisting the original defendants without being liable to be made defendants ourselves.

Peterson, K.C., and *Whitmore Richards*, for the plaintiffs. The principles of *Hext* v. *Gill* (2), *Tipping* v. *Eckersley* (3), and *Shafto* v. *Bolckow, Vaughan & Co.* (1) clearly apply to a district council: *Leckhampton Quarries Co.* v. *Ballinger*. (4)

We are entitled to ask for a declaration without making out any right to consequential relief: Order xxv., r. 5; *Dyson* v. *Attorney-General* (5); *Burghes* v. *Attorney-General* (6); *Barraclough* v. *Brown*. (7)

The Andover Council as quasi-trustees for the public are asserting a right on their behalf and spending public money in defending that right. That is sufficient ground for a declaration and injunction. We are, however, quite willing to amend by alleging that the Andover Council assert a public right of way and threaten and intend to exercise it by their servants or agents. We consider this amendment quite unnecessary, but ask leave to make it so as to avoid any difficulty.

Austen-Cartmell in reply. In *Leckhampton Quarries Co.* v. *Ballinger* (4) the plaintiffs alleged that the Cheltenham Council threatened and intended to enter on the plaintiffs' property. In their defence the Cheltenham Council set up four public rights

(1) 34 Ch. D. 725, 728.
(2) (1872) L. R. 7 Ch. 699, 711.
(3) (1855) 2 K. & J. 264, 270.
(4) (1904) 20 Times L. R. 559, 561.
(5) [1911] 1 K. B. 410, 415, 417.
(6) [1911] 2 Ch. 139, 155.
(7) [1897] A. C. 615, 623.

of way which they said it was their duty to protect, but denied that they threatened or intended to enter on the plaintiffs' property "save in so far as may be consistent with their duty to prevent the stopping or obstruction of the said public rights of way." They actually counterclaimed for an injunction against obstruction, though they abandoned this at the trial, on the ground of the absence of the Attorney-General.

Having accepted their position as defendants and fought the case at the trial, they suggested that there could be no relief against them because they had not committed any act of trespass. In those circumstances a declaratory order was made against them as to the particular right of way on which they failed, with corresponding declarations in their favour as to the three rights of way on which they succeeded.

In the present case we have not accepted the position of defendants, but have applied at once to be struck out. There is no allegation that we threaten or intend to exercise the right of way. We are merely assisting the original defendants. In *Dyson* v. *Attorney-General* (1) the Crown was in effect threatening to enforce a penalty for non-compliance with Form IV. and it was held that the subject might ask for a declaratory order that Form IV. was invalid. It was practically the only way the subject could ascertain his position without risking an action for the penalty.

[SWINFEN EADY J. The question is, first, whether I should give leave to amend, and, secondly, whether the proposed amendment will affect your argument.]

As the pleadings stand, we are merely being sued in our representative capacity, and the claim discloses no cause of action. The plaintiffs now propose to sue our corporation as an ordinary member of the public asserting a right to use the public right of way if so minded and threatening and intending so to do. That is a quia timet action of trespass. The plaintiffs ought not to be allowed to change their form of action entirely in this way, but if the amendment is allowed the costs of the motion should be ours in any event. If the plaintiffs fail in their action of trespass, our original contention that they have no cause of action will stand.

(1) [1911] 1 K. B. 410, 415, 417.

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SWINFEN EADY J. (after stating the facts). It is not suggested that any of the acts of the original defendants were done at the request or instigation of the Andover Council. The original defendants acted on their own motion. The allegation is that the Andover Council assert that there is a public right of way. The plaintiffs ask leave to amend by alleging that the Andover Council assert a public right of way and threaten and intend to exercise it by their servants or agents and by asking for a declaration and injunction accordingly.

I think the plaintiffs ought to have leave to amend in this way. It is a proper amendment which will enable the real question to be raised. It is not sought to recover damages against the Andover Council, who have committed no acts of trespass and are in no way responsible for the acts of the original defendants. But in substance there is only one question to be decided, namely, whether, as all the defendants assert, there is a public right of way.

In my opinion, treating the claim as thus amended, it cannot be maintained that it discloses no reasonable cause of action against the Andover Council. It is their duty to protect public rights of way, and assuming that they assert that this is a public right of way and threaten and intend to exercise that right by their servants or agents, I think the plaintiffs have a reasonable cause of action against them.

In support of this view I need merely refer to *Shafto* v. *Bolckow, Vaughan & Co.* (1), where Chitty J. says: "But on another ground I think they"—the lessors—"are properly made defendants, which is this—that they do claim in substance the right to do these things. As was said, though not for the first time, in *Hext* v. *Gill* (2), and there laid down, where persons claim to have the right to do a thing, even though saying they have no present intention of doing it, they are proper parties to a bill for a declaration of right and for an injunction. So also in *Tipping* v. *Eckersley* (3) Vice-Chancellor Wood says that if the defendant claims and insists on the right to do a thing, although he has not already done it modo et forma, as alleged,

(1) 34 Ch. D. 725, 728. (2) L. R. 7 Ch. 699, 711.
(3) 2 K. & J. 264, 270.

he would be a proper party to the suit, and against him he (the Vice-Chancellor) should have no difficulty in granting an injunction. I have always understood it to be the settled practice that when a person claims a right, that is a ground for making him a party to an action for an injunction."

That is the exact position of the Andover Council here. It is alleged that they claim a right and threaten and intend to exercise it by their servants or agents. After the decisions in *Dyson* v. *Attorney-General* (1) and *Burghes* v. *Attorney-General* (2) it cannot be contended that an action for a declaration is not maintainable.

It is urged that the council are entitled to assist the original defendants to fight the issue as to the public right of way and are not bound to fight it themselves so as to become liable for costs. The present order will not, however, necessarily compel the Andover Council to fight that issue. It will be open to them to consider their position on receiving the amended statement of claim and decide whether they will assert the right of way, or abandon any claim to it.

I refuse the motion and give the plaintiffs leave to amend. The costs of the motion and of and consequent on the amendment will be costs in the action.

Solicitors : *Indermaur & Brown, for W. R. Graham, Andover ; Chapman-Walker & Shephard.*

(1) [1911] 1 K. B. 410, 415, 417. (2) [1911] 2 Ch. 139, 155.

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Feb. 12, 13; March 2.

In re An Applicaton of R. J. LEA, LIMITED, FOR REGISTRATION OF A TRADE MARK.

Trade Mark—Registration—Special Application—Surname—"Boardman's"—"Distinctive Mark"—"Adapted to distinguish"—User—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* (5.); *s.* 44.

Previous to 1868 R. J. Lea, a tobacconist, had supplied to one Boardman, a licensed victualler in Manchester, a tobacco mixture which became known and was asked for as "Boardman's" mixture. In 1868 R. J. Lea, with Boardman's sanction, began to sell this mixture to the public under a label bearing the words "Boardman's Smoking Mixture" in addition to other matter, including the name, address, and a trade mark device of R. J. Lea. This label was registered in 1887 as a whole for "tobacco being a smoking mixture." In 1910 R. J. Lea, Limited, the successors in business of R. J. Lea, applied to register the word "Boardman's" under s. 9 (5.) of the Trade Marks Act, 1905, as a trade mark in respect of manufactured tobacco. There was evidence that in a limited market among persons who knew and liked the mixture it was known and spoken of as "Boardman's," and that the word had been used as a trade mark in connection with goods for the purpose of indicating that they were the goods of the applicants. The application having been referred to the Court by the Board of Trade, it was dismissed by Joyce J. on the ground, inter alia, that a mere surname of an individual applicant, though it might be adapted to distinguish the goods of all the persons, taken collectively, who bore that surname from the goods of other persons bearing a different surname, was not adapted to distinguish the goods of the applicant from those of other persons within the meaning of that expression in the Act, and ought not, therefore, to be registered under s. 9 (5.). On appeal from that decision:—

Held, without deciding whether a surname was registrable per se, that on the evidence the word "Boardman's" was not "adapted to distinguish" the goods of the applicants from those of other dealers in tobacco, and was not therefore registrable as a "distinctive mark" within s. 9 (5.) of the Act.

Decision of Joyce J. [1912] 2 Ch. 32, affirmed.

Appeal from a decision of Joyce J. (1)

In November, 1910, R. J. Lea, Limited, wholesale tobacconists, of Manchester, applied to register the word "Boardman's" under paragraph (5.) of s. 9 of the Trade Marks Act, 1905, as a trade mark in class 45 in respect of manufactured tobacco.

The Board of Trade referred the application to the Court under r. 39 of the Trade Mark Rules, 1906, and notice of motion was served upon the Registrar of Trade Marks.

(1) [1912] 2 Ch. 32.

The facts relating to the application were as follows. The applicant company carried on a very large business as tobacco and cigarette manufacturers at Manchester, and were the successors in business of Robert John Lea, who for over fifty years had carried on business as a tobacconist. Previous to the year 1868 R. J. Lea had supplied to a Mr. Boardman, who was a licensed victualler in Manchester, a tobacco mixture which became known amongst his friends and acquaintances, and, for purposes of identification, was asked for, as "Boardman's" mixture. In the year 1868 R. J. Lea, with Boardman's sanction, commenced to sell and had since continuously sold this mixture to the public at large under a label bearing the name "Boardman's Smoking Mixture," in addition to other matter including the name and address of R. J. Lea and his usual trade mark device of wild strawberry leaves. This label was registered in 1887 as a whole for "tobacco, being a smoking mixture," in class 45 under the number 69,908. The evidence further shewed that labels or wrappers had been used in connection with the said tobacco, but from what date and to what extent did not appear. These labels were in a form similar to, but not the same as, the above-mentioned registered label; they bore across them, stamped in red, the word "Boardman's" in capital letters. The evidence did not shew when or where or to what extent that superimposed stamp of the word "Boardman's" had been used. The wrappers also contained, in a position which would place it on the circumference of the canister containing the tobacco, the words "Boardman's. The mildest tobacco, R. J. Lea, Ltd." The applicants also used circulars or leaflets in which the word "Boardman's" appeared and the sellers were named as R. J. Lea, Limited, but the times when or the places where these circulars or leaflets had been used did not appear. There was also evidence that the expression "Boardman's" had been orally and habitually used by persons requiring this particular tobacco. The area over which the evidence as to user extended was substantially confined to the north of England subject to the addition of Bristol and Cambridge and, to some extent, London.

"Boardman's" tobacco had established a very considerable reputation and enjoyed a very large sale, and there was evidence

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that no other tobacco had been placed on the market under a name similar to "Boardman's."

The motion was heard by Joyce J., who held that the mere surname of an individual applicant, although it may be "adapted to distinguish" the goods of all the persons taken collectively who bear that surname from the goods of other persons bearing a different surname, is not "adapted to distinguish" the goods of the applicant, even though his surname be an uncommon one, from those of other persons within the meaning of that expression in the Act, and ought not therefore to be registered as a distinctive mark under s. 9 (5.).

From this decision the applicants appealed. The appeal came on for hearing on February 12, 1913.

Astbury, K.C., *Hughes, K.C.*, and *Sebastian*, for the appellants. The object of s. 9 of the Act of 1905 was to extend the range of registrable trade marks and to give protection to traders who had established the indicia of a mark which was not an old mark used before the passing of the Act of 1875. Paragraph (5.) of s. 9 is the novelty of the present Act and extends to marks not coming within paragraphs (1.), (2.), (3.), or (4.), enabling the registrar to put any mark upon the register if it is a distinctive mark, but in the case of a name mark an order of the Board of Trade or Court is required.

Many surnames were registered as old marks under the Act of 1875 as being "special and distinctive" when Sir George Jessel M.R. was Commissioner of Trade Marks. The views taken by the Courts in *Ainsworth* v. *Walmsley* (1), *Richards* v. *Butcher* (2), and *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (3) are directly opposed to those expressed by Warrington J. in *In re Pope's Electric Lamp Co.'s Applications* (4) and by Joyce J. in the present case and in *In re William McEwan & Co.'s Application.* (5)

We submit that those decisions of Warrington J. and Joyce J. are wholly wrong and quite inconsistent with what Fletcher

(1) (1866) L. R. 1 Eq. 518.
(2) [1891] 2 Ch. 522.
(3) (1900) 17 Rep. Pat. Cas. 673.
(4) [1911] 2 Ch. 382.
(5) [1912] 2 Ch. 32.

Moulton L.J. said in *In re Joseph Crosfield & Sons, Ld.* (1) They both seem to say that unless a name comes within paragraph (1.) of s. 9 it cannot be registered at all. The decision in *In re Pope's Electric Lamp Co.'s Applications* (2) practically repeals paragraph (5.) of s. 9 and quite disregards the question of a mark being rendered distinctive by user. As Fletcher Moulton L.J. has pointed out, it is impossible to say that a name is not distinctive when evidence of user for twenty years proves irrefutably that it is. Sect. 44 of the Act of 1905 clearly contemplates that a surname may be registered. Joyce J. relied upon decisions under an old statute which has been repealed, and illustrated his reasoning by reference to the names of Purdey, Croft, and Cockburn as names not used as trade marks, whereas, in fact, all those names are registered trade marks. The "Perfection" case, *In re Joseph Crosfield & Sons, Ld.* (1), was a wholly different case from that of a surname which has become known as identified with some particular article.

[Buckley L.J. Is there any case in which at this stage the application has been directed to stand over to let people come in and oppose?]

The question was discussed before Swinfen Eady J. in *In re Hjorth & Co.'s Application* (3), and he made an order that the application to register be accepted, being of opinion that a further order of the Board of Trade or the Court that the mark was to be deemed to be distinctive was necessary after the advertisement and subsequent opposition, if any. Parker J., however, did not adopt that form of order in *In re Itala Fabbrica di Automobili's Application* (4), but declared that for the purposes of the application to the registrar for registration the mark be deemed a distinctive mark within the meaning of s. 9 (5.), and ordered the registrar to accept and proceed with the application accordingly. The subject was also mentioned by the Court of Appeal in *In re Joseph Crosfield & Sons, Ld.* (5) and in *In re W. & G. Du Cros' Applications.* (6)

(1) [1910] 1 Ch. 130.
(2) [1911] 2 Ch. 382.
(3) (1910) 27 Rep. Pat. Cas. 461, 466—468.
(4) (1910) 27 Rep. Pat. Cas. 493, 497.
(5) [1910] 1 Ch. 130, 141, 148.
(6) [1912] 1 Ch. 644, 652, 656.

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There is evidence in this case of very wide user and also that no other tobacco has been placed on the market under any name similar to "Boardman's." On this preliminary inquiry we ask the Court to direct the registrar to proceed with the application, and any opposition can be dealt with at a later stage.

Sir John Simon, S.-G., and *Sargant*, for the Registrar of Trade Marks. The future has to be considered as well as the present, and the question of difficulty in a case of this sort is whether a trader is entitled to come and say that there is no one who can compete with him, and that, inasmuch as he has shewn that his name is widely used in connection with his goods, he has established what the Act of Parliament requires and is entitled to registration. Registration of his trade mark may prevent small traders in future from using their own name. If the Court grants this present application and directs it to proceed, then Trade Marks Rule 41 applies, and, unless some objector opposes, registration will take place in due course, and nothing further can be done in the interests of the public.

[BUCKLEY L.J. If this application is adjourned until after the advertisements have been issued, then the Crown and any trader affected can come in on a final hearing and oppose.]

But once the Court has said that this mark is registrable because it is to be deemed to be a distinctive mark, that cannot be afterwards called in question, and there will be nothing further left upon which the registrar can exercise his discretion. In *In re Teofani & Co.'s Trade Mark* (1) the Board of Trade directed the registrar to proceed with the registration under s. 9 (5.), and Warrington J. held that the order of the Board of Trade was final and conclusive and that the Court had no jurisdiction to rectify the register by removing the company's mark.

[FARWELL L.J. Sect. 9 (5.) seems to point to the order of the Board of Trade or the Court being treated as a preliminary proceeding. In *In re W. & G. Du Cros' Applications* (2) we treated the question as if by way of demurrer, and when I withdrew my objection to the Court directing the registrar to proceed with one of the marks, I certainly did not mean to accept that as a final decision binding the law officers.]

(1) Ante, p. 191.

(2) [1912] 1 Ch. 644.

Under s. 9 (5.) the Court decides whether the mark is to be deemed a distinctive mark, and only after that is done does the registrar's duty begin.

[Buckley L.J. Under s. 12 (1.), (2.), (3.) and (4.) cannot the registrar accept an application for registration conditionally, then issue the advertisements and proceed to determine the question of registrability when opponents come in and object?]

There is nothing in the Act of 1905 to warrant such an adjournment as is now proposed. The objection on behalf of the Crown is that if this application is now adjourned to be advertised, then, unless some one comes within a month in answer to the advertisement and opposes, there is nothing further to be done but to proceed to registration, for once an application has been accepted registration must follow.

The judgment of Fletcher Moulton L.J. in *In re W. & G. Cros' Applications* (1) does not conclude the matter against the Crown in this case, and we submit that the decisions in *In re Pope's Electric Lamp Co.'s Applications* (2) and of Joyce J. in this case were right.

There is no evidence in this case that the mark is by user in fact distinctive for the goods with respect to which it is proposed to be registered; the Court has therefore nothing to take into consideration under the last paragraph of s. 9 (5.).

It is not contended that surnames are not per se registrable, but they are not in general desirable trade marks.

Astbury, K.C., in reply. It is clear upon the evidence that "Boardman's" has been long identified with packet tobacco put up by Lea. The word is therefore adapted to distinguish or "distinctive for the goods with respect to which it is proposed to be registered." As regards the future, protection is afforded by s. 44 to any one of the name of Boardman who wishes to deal in tobacco. The registration will not interfere with the bona fide use by him of his own name.

The same arguments were used unsuccessfully against our contention in *In re California Fig Syrup Co.* (3)

Where a title to protection for a mark has been established by

(1) [1912] 1 Ch. 644. (2) [1911] 2 Ch. 382.
(3) [1910] 1 Ch. 130.

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user it is better that it should be put upon the register and so known to all.

This case comes within *In re California Fig Syrup Co.* (1) and registration of the mark ought not to be stopped at this stage. It ought to be allowed to proceed unless, after advertisement, opponents come in and succeed in their opposition.

[Upon the question whether "Boardman's" was a name within s. 3 of the Act of 1905, *Sir J. Simon, S.-G.*, referred to *Alexander Pirie & Sons* v. *Goodall.* (2)]

Astbury, K.C. But see *In re Colman's Trade Mark Application* (3), where that case is explained.

[He also referred to *In re Trade Mark of La Société Anonyme des Verreries de l'Etoile* (4) and *In re Dewhurst & Sons' Trade Mark.* (5)]

Cur. adv. vult.

Mar. 2. FARWELL L.J. Under s. 9 (5.) of the Trade Marks Act, 1905, Joyce J. has refused to order that "the name . . . . or word or words" "Boardman's" ought to be deemed to be a distinctive mark. In considering this question he has come to the conclusion that the word "Boardman's" is not a trade mark "in actual use" within the last paragraph of s. 9 and that there has been therefore no user which could render such trade mark (i.e., a trade mark used as such) distinctive of the goods for which it is proposed to be registered.

I have already in the "Perfection" case, *In re Joseph Crosfield & Sons, Ld.* (6), and *In re W. & G. Du Cros' Applications* (7) expressed my opinion on the general intent and construction of this Act, and I do not propose to repeat it here. It is plain to my mind from the phraseology of s. 9 that the name of a company, individual, or firm by itself is not, prima facie and without more, distinctive; nor is a geographical name or surname; and there is nothing more I think it would be wrong for the Board of Trade or the Court to allow such to be registered. The Act in pars. 1 and 2 of s. 9 has been careful to limit the power of

(1) [1910] 1 Ch. 130.
(2) [1892] 1 Ch. 35, 43.
(3) [1894] 2 Ch. 115.
(4) [1894] 2 Ch. 26.
(5) [1896] 2 Ch. 137.
(6) [1910] 1 Ch. 130.
(7) [1912] 1 Ch. 644.

obtaining registration of such words to the distinctiveness arising out of the special or particular manner of representation or the peculiarity of signature, so that any number of individuals called "John Smith" may obtain protection for their signature, as written by them, but not for the name of "John Smith." Further, it is plain that the surname alone does not come within s. 9 (1.), unless it be the name of a firm, for example, "Birchams": the name or signature of an individual means that which individualizes him; he may belong to the great family of Smith, but he is identified as an individual by his own prénom as distinguished from his family name; he is John Smith, a member of the Smith family. Further, "surname" is excluded from par. 4, and is therefore not prima facie adapted to distinguish; the argument that the very object of a surname is to distinguish is specious but deceptive; Smith is doubtless well adapted to distinguish its bearers from Brown, but not from all or any of the members of the family of Smith.

It is doubtless true that the object of the Act is to extend the area of words adapted to be used as trade marks, but when the Legislature has shewn that certain words are prima facie not included, the Court ought to be careful in exercising a discretionary jurisdiction to enlarge such area and should remember that the owner of a trade mark under the Act enjoys a monopoly after seven years for all time and over the whole United Kingdom. Thus, while it may be proper to allow "Monte Rosa," although a geographical name, to be registered for cigarettes (to take Fletcher Moulton L.J.'s illustration), because there is no possibility of growing or making cigarettes on that mountain, it would be otherwise with regard to Egypt or any other locality in which tobacco may be grown or cigarettes made; and, by parity of reasoning, it must be prima facie wrong to allow a mere surname either with or without prénom to be used as distinctive, because every one has a prima facie right to trade in his own name, and ought not to be hampered in its use, unless such name has become so completely identified with some article as to be a household word for such article, and this is provided for by the last paragraph of s. 9: "In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in

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actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered"; and for this the Act requires two things to be proved—(1.) that the trade mark is in actual use; (2.) that such user has been sufficient to render it in fact distinctive. Actual use may be enough, although slight in extent, to support an action for passing off against a wrong-doer who is intentionally trying to intercept the benefit of the plaintiff's reputation and credit; but it is quite another thing to say that the use is enough to have displaced the ordinary meaning of any family name and to have turned such name quoad tobacco or any ther article into meaning primarily not a man or a family but an article.

The present applicants are R. J. Lea, Limited, and they desire to register "Boardman's" for manufactured tobacco sold by them, and their claim therefore comes within the definition of trade mark in s. 3, "A mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale." The claim is therefore for a monopoly of the word "Boardman's" in the sale of manufactured tobacco. The name originated from the supply by a predecessor in trade of the applicant of a smoking mixture to a licensed victualler in Manchester called "Boardman" and originally meant "such tobacco as Lea supplies to Boardman." In 1887 an elaborate trade mark with "Boardman's Smoking Mixture" as a small part of it was registered under No. 69,908, and tobacco and cigarettes have been sold for some years as "Boardman's," and I will assume that there has been some use of "Boardman's" whether as a mere name or as an elliptical sentence equivalent to "Boardman his tobacco" so as to bring the last paragraph of s. 9 into operation.

I am not sure that I altogether follow Joyce J.'s line of thought; but even if I differ from him as to "actual use," I agree in the conclusion that the evidence falls far short of that universality which is required for distinctiveness within s. 9. The tobacco is not manufactured or dealt with in any way by Lea & Co.; it is merely sold by them and no doubt is selected by

them with care; but there is no peculiarity about the article sold; this is no doubt sufficient to satisfy the definition of trade mark in the Act; but the nature of the article and the merit of the claimant in respect thereof are relevant matters in exercising the discretion whether the area of registrability should be extended so as to include it. But the area in which it is alleged that "Boardman's" does not mean a family or person, but tobacco sold by Lea & Co. is far too limited in extent to justify the Court in granting a monopoly in the whole United Kingdom. Glasgow is the only place in the whole of Scotland and Belfast in the whole of Ireland to which the evidence extends; there is no place in Wales. In England there is one firm in Whitechapel, but no one else in London; there is one at Sandgate in Kent, and one in Cambridge; many large towns in the north and Northern Midlands, but no one at all in the whole of the south of England or the Southern Midlands or in the west except one retail seller in Bristol.

In my opinion this evidence is quite insufficient and Joyce J. was right in his conclusion and this appeal should be dismissed with costs.

The question of the effect of a decision to the contrary was argued before us, and the Solicitor-General contended that the registrar and the law officers would have no further opportunity of contesting the claim if the order was made to register and no one gave notice of opposition or possibly whether any one gave such notice or not. There seems to me to be great force in his argument, but I express no final opinion on it, as it does not arise in the view that we take. I only desire to say that the point was not argued in *In re W. & G. Du Cros' Applications* (1), and I certainly was (and I believe my brethren also in that case were) under the impression that the contrary was the true view. I should certainly not have withdrawn my objection to one of the marks if I had thought that our decision was final as against the law officers.

Buckley L.J. In the report of this case before Joyce J. it appears that the contention of the registrar and the decision

(1) [1912] 1 Ch. 644.

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of the judge were that a surname is not registrable. Counsel cited *In re Pope's Electric Lamp Co.'s Applications* (1) as an authority decisive on that point, and the learned judge says that he decides that a mere surname is not adapted to distinguish. In this Court the case has assumed a totally different aspect. The registrar's counsel have stated that they do not dispute that surnames are registrable, although they suggest that they are not as a rule adapted to distinguish. The point whether a surname is registrable is not in question and has not been argued before us and I therefore, of course, express no opinion upon it. This is a first reason why the principal point decided in the Court below does not require to be considered in this Court. A second reason is the following. The word which the applicants seek to register is not a surname. The word is "Boardman's." That is a word which obviously is used elliptically to express some statement of a fact relating to Boardman. It may, for instance, be equivalent to "manufactured by Boardman" or "sold by Boardman," or "smoked by Boardman," or say "Boardman's tobacco," or "Boardman's mixture." It is some form of elliptical sentence in which a surname occurs. The point which Joyce J. decided therefore does not arise.

The point for our decision I think is, whether having regard to s. 9 (5.) of the Trade Marks Act, 1905, and the proviso and clauses which follow, the word "Boardman's" is adapted to distinguish the goods of R. J. Lea, Limited, from those of other persons, meaning I think from those of all other persons. The word "Boardman's" either has or has not heretofore been used as a trade mark. In either case the last paragraph but one of s. 9 applies and the question of fact has to be determined whether the word "Boardman's" is adapted to distinguish. Further, if the word "Boardman's" has been a trade mark in actual use, then the last paragraph of the section applies and the tribunal may take into consideration the extent to which its user has rendered the trade mark in fact distinctive. But in any case the question whether the word is adapted to distinguish or not is a question of fact, or, to be more accurate, is a question of opinion to be formed upon facts.

(1) [1911] 2 Ch. 382.

Upon this question the applicants have filed certain evidence. The learned judge has stated that in his opinion that evidence when rightly considered does no more than go to shew the great repute of the goods manufactured by the applicants. He thinks the evidence insufficient. But inasmuch as he decides the case upon the point as to a surname not being registrable this observation was not the ground of his decision. Before us, however, it is, I think, the question to be answered.

The applicants have proved that since 1878 and probably since 1868 a label in the form which was subsequently registered in the year 1887 and is found on p. 368 of the *Trade Marks Journal* of March 21, 1888, has been used to sell a smoking mixture which Mr. R. J. Lea had introduced and which he called "Boardman's." Further, the evidence is that labels or wrappers of which specimens are contained in the exhibit B have been used in connection with the said tobacco, but as from what date and to what extent and where does not appear. These labels, exhibit B, are in a form similar to but not the same as the label in the *Trade Marks Journal*, but further they bear across them, stamped in red, the word "Boardman's" in capital letters and in inverted commas. The evidence does not shew when or where or to what extent that superimposed stamp of the word "Boardman's" has been used. The wrapper also contains in a position which would place it on the circumference of the tin canister the words "Boardman's. The mildest tobacco, R. J. Lea, Ltd." The applicants also exhibit a bundle of circulars, exhibit C, in which the short title "Boardman's" is used and the sellers are named as R. J. Lea, Limited. Again no dates are given as regards the times when or the places where these circulars or advertisements have been used. There is also a substantial amount of evidence by persons who say that the expression "Boardman's" has been orally used and habitually used by persons wanting this particular tobacco. As regards the area over which the evidence extends it is substantially confined to the north of England subject to the addition of Bristol and Cambridge and, to some extent, London. To summarize the evidence it comes, I think, to this, that in a limited market among persons who knew and liked this particular smoking mixture it

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was known and spoken of as "Boardman's," and there is, I think, some evidence from the exhibit C that the word "Boardman's" has been used as a trade mark in a sense falling within the definition in s. 3, namely, as a word used in connection with goods for the purpose of indicating that they were the goods of the applicants by virtue of their offering them for sale. The question then to be answered is, Does this evidence satisfy the Court that the word "Boardman's" is adapted to distinguish the goods of the applicants from those of other dealers in tobacco? The learned judge thought it did no more than shew the great repute of the goods. I am not prepared to differ from him upon this question of fact. This is not a case in which the seller of goods is offering them for sale under a mark containing or indicating his own name. It is far from obvious that "Boardman's" is adapted to distinguish goods sold by R. J. Lea, Limited. The word is not as a word adapted to make that distinction at all. Assuming that "Boardman's" is by exhibit C shewn to have been used to some extent as a trade mark so as to let in the last paragraph of s. 9, the evidence is I think insufficient to shew that the user has rendered the word in fact distinctive of the goods by identifying them with R. J. Lea, Limited. An alternative view might be that "Boardman's" may have acquired a secondary meaning in which it conveys a particular smoking mixture having certain defined characteristics. But there is no evidence to support this. Neither is the claim to registration made on that footing. The application is to register for manufactured tobacco, not for a particular mixture. The evidence comes to this: that people who knew the goods asked for the goods by the name "Boardman's," but as between R. J. Lea, Limited, and other persons the word "Boardman's" would not to a person not previously acquainted with the goods be adapted to distinguish Lea's goods from the goods of another person, and certainly not from those of a person whose name might in fact be Boardman. Upon these grounds I think that the decision of the learned judge should be maintained. But having regard to the fact that the question before us was totally different to that which was argued before and decided by the learned judge I think there ought to be no costs of this appeal. Had the case

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been argued below for the registrar and decided by the learned judge on the grounds on which the registrar succeeds before us there might have been no appeal.

We have had an interesting discussion upon another matter of great importance upon which I express no opinion because in the above circumstances it does not arise. Inasmuch as this Court is deciding against the applicants there is no difficulty in determining in the absence of possible opponents that the applicants are wrong. Had the Court been of a different opinion and thought that the applicants were right it would have been necessary to determine whether at this stage the Court should make an order determining in the absence of interested persons and in favour of the applicants the question whether the word here in question is a distinctive mark or not. In applications under s. 9 (5.), there necessarily arise two questions which are different, namely, (1.) whether the mark is registrable as being distinctive, and (2.) whether being registrable it should be registered. The former of these rests upon the determination of a question of fact whose decision may be of great importance to persons who subsequently come in to oppose the application. If the Court were disposed to determine the matter in favour of the applicants it would strive to find some means by which the decision of the question whether the mark is distinctive or not should be postponed until the opponents have been brought in and can be heard upon it. In this connection it would be necessary to consider *In re Hjorth & Co.'s Application* (1), *In re Itala Fabbrica di Automobili's Application* (2), and what was said in *In re Joseph Crosfield & Sons, Ld.* (3) and *In re W. & G. Du Cros' Applications.* (4) It is not necessary to decide it now and I express no opinion upon it.

HAMILTON L.J. The question before the learned judge was whether the word "Boardman's," assuming this to be a "name" under s. 3 of the Trade Marks Act, 1905, and therefore a "mark," was a "distinctive mark," that is "adapted to distinguish the goods and the proprietor of the trade mark"—the mark

(1) 27 Rep. Pat. Cas. 461.
(2) 27 Rep. Pat. Cas. 493.
(3) [1910] 1 Ch. 130, 143.
(4) [1912] 1 Ch. 644.

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" used, or proposed to be used, upon, or in connexion with " the applicant's goods—" from those of other persons." Unless this question is answered in the affirmative " Boardman's " is not a registrable trade mark at all. Where a trade mark is one in actual use a special provision is made for admitting evidence of user for the special purpose of proving " the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered, or proposed to be registered." " Trade mark " here means a mark which is used, not one " proposed to be used," for the words of the context, " in actual use," "otherwise" require. The word "extent" makes this essentially a question of degree; the word " may " shews that, although, acting judicially, the judge should in all proper cases give effect to this evidence, it is not necessarily conclusive: further it is to be " taken into consideration," and is not made decisive of the case. I will assume that " Boardman's " may be treated as a name for the present purpose, without discussing whether the use of the possessive case does not convert it into a compressed proposition, predicating of Boardman some relation to the tobacco in question, and so making it something other than a name. The judgment of this Court in *Alexander Pirie & Sons* v. *Goodall* (1) is, however, strongly to the contrary.

There is no evidence at all that " Boardman's " has actually been used upon the goods in question by itself. It has only been used in combination with other words, and on a specially devised label. There has been no "such" user of " Boardman's " simply, i.e., user as an actual trade mark. The evidence of its use, even in such combination, as a word dissociated from other words, fails in the very essential particular of saying how long the word has been so dissociated either by position or by colour. There was evidence of the use of " Boardman's " in connection with the goods on leaflets, which were principally directed to extolling the virtue of " Chairman " tobacco, but no deponent refers to these leaflets except one, namely, Mr. Allen, the director of the applicant company. The others adopt the same formula in almost all cases: " The said tobacco is in my experience asked

(1) [1892] 1 Ch. 35.

for by the public as 'Boardman's,' or as 'Boardman's mixture,' or 'Boardman's tobacco,'" without any other description; and they do not mention the leaflets even by implication. They speak also of being well acquainted with the tobacco "put upon the market by the applicants, or the tobacco of the merchandise of R. J. Lea & Co." Presumably this was thought to be the most favourable way of presenting the applicants' case, but the fact remains that these deponents do not point their evidence to the use of "Boardman's" otherwise than upon the goods in combination with the rest of the label, or by actual word of mouth, with the above mentioned additions. I think the learned judge was fully warranted in holding that as regards the mark "Boardman's" there was certainly no sufficient evidence, and practically no evidence at all, of "the case of a trade mark in actual use."

The case was argued on the footing that this evidence was admissible to prove that the mark was "adapted to distinguish," even though there was no "case of a trade mark in actual use." It may be doubted if this is so; for if such evidence could be adduced to prove adaptability in general, special words were not needed to make it admissible to prove that the test of user had shewn it to be in fact distinctive. Without discussing this I ask, what did the evidence amount to? It proved that in a number of places, generally unnamed, but where named mostly in England, north of the Trent, people who wish to smoke this brand of the applicants' tobacco ask for "Boardman's," and people whose business it is to satisfy them sell them this brand. It is not exclusively "Boardman's" that is asked for, often it is "Boardman's mixture," or "Boardman's tobacco." We are not told which is the term most in use. What the people who sell and the people who buy understand by these terms we do not know, or what they think Boardman has, or had, to do with it. At most it shews that a good many people call this brand "Boardman's," and a good many others call it something else, and all ultimately get it from the applicants, whether they know or care about the origin or meaning of the name or not.

This evidence is not contradicted, or cross-examined to, but the nature of the case and the scheme of the statutory proceedings

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make the first impracticable, and the second fruitless. The Board of Trade cannot contradict such evidence, and as it is not suggested that the deponents are not honest witnesses there was little to be gained by cross-examination. The matter at this stage was ex parte in this sense, that except the applicants themselves no person wishing to use the name "Boardman's" is or can be before the Court. The evidence is collected, selected, and put in by interested parties on one side only. The decision is not res judicata as regards opposing parties when they appear before the Court for the first time at a later stage (*Crosfield's Case* (1)), but it may be, and often is, the case that no opposing parties appear in response to the registrar's advertisement. The natural order to make in exercising the jurisdiction of the Court under s. 9 would be that the Court does, or does not, declare that the mark is to be deemed to be a distinctive mark. This, at any rate, is the substance of the order; nor, I confess, can I appreciate the advantage of making it in any other form, with all respect to the different views taken by Swinfen Eady J. in *Hjorth's Case* (2), by Parker J. in the *Itala Case* (3), and by Warrington J. in *Teofani's Case*. (4) In any form the order binds the registrar since he has been a party to the application. Its effect is to make that a distinctive mark for the purposes of the Act which otherwise would not be such. The order brings within his competence under the Act a mark which without order would have been beyond it, and accordingly he goes on to discharge his functions by advertising, and so forth, by virtue of the Act, and under his responsibility to the Board of Trade (46 & 47 Vict. c. 57, s. 82, sub-s. 3, and 7 Edw. 7, c. 29, s. 62, sub-s. 2), and not as an executive officer of the Court, taking its directions and carrying out its behests. Even if the addition of the words inserted in the order in those cases prevents the Court's declaration from being a final adjudication as regards the registrar, ss. 13, 14, and 16 seem to leave him no further opportunity for considering the matter in the event of no parties appearing to oppose.

(1) [1910] 1 Ch. 130; 26 Rep. Pat. Cas. 837.

(2) 27 Rep. Pat. Cas. 466.

(3) 27 Rep. Pat. Cas. 497.

(4) Ante, p. 198.

The relevance of these considerations is that, in hearing such a motion as Joyce J. heard, the learned judge, whichever way he decides, is well warranted in taking into account the facts that he has to act on one-sided evidence, that his opinion binds the registrar, and that except by way of appeal on the same materials his decision cannot be reconsidered, unless it should happen that opponents come forward and proceed to a hearing. I am not of course dealing with separate proceedings to remove a mark from the register under s. 35 of the Act of 1905. It is accordingly well within the limits of his discretion to scrutinize the evidence in such a case with a critical and even a sceptical vigilance that would not be incumbent upon him if he were trying an issue upon evidence which both sides were free to adduce and both were in a position to contest. The position is one that is familiar in other connections; indeed it is recorded that Parke B. took a peculiar pleasure in nonsuiting plaintiffs in undefended actions.

Further the Act says "adapted to distinguish"; the mere proof or admission that a mark does in fact distinguish does not ipso facto compel the judge to deem that mark to be distinctive. It must be further "adapted to distinguish," which brings within the purview of his discretion the wider field of the interests of strangers and of the public. In so far as the decision of Joyce J. was influenced by his conclusion that he was not satisfied with the proof adduced by the applicants, and is to be treated as a matter of discretion, I do not think that he exercised his discretion wrongly; as a conclusion on the weight of evidence I agree with it.

The question that remains is whether, apart from evidence, "Boardman's" can be said to be "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." I think this means not from the goods of some other person, but from the goods of other persons generally. Construing a similar provision contained in the Trade Marks Act of 1875, s. 10, Fry L.J. in *In re Wood's Trade Mark* (1) held it to mean "distinctive in this sense, that they distinguish the manufacture of the person who has registered the trade mark from the

(1) (1886) 32 Ch. D. 247, 262.

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manufacture of all other persons." I agree with the observation that has been made that as a distinctive mark the proprietor's surname is adapted to distinguish the goods of the proprietor of the mark from those of persons who do not bear or use that name, but only to confuse them with the goods of other persons who do bear that name. Where the name is not the vendor's but another's surname the case is a fortiori. This is not a proposition of law but of plain common sense. The Solicitor-General has not contended that all surnames per se are unfit to be deemed distinctive marks, and Mr. Astbury has confessed to great difficulty in claiming such fitness for very common surnames. Notwithstanding the observations of Kay J. in *Richards* v. *Butcher* (1), I agree with what Warrington J. says in *In re Pope's Electric Lamp Co.'s Applications* (2), with a reservation only as to his proposition that such a name "cannot become so adapted by any amount of user," as to which I express no opinion. Between names which few bear or would care to claim, and names which are borne by multitudes, there is a vast field. The former class of names may be effectively distinctive; the latter too notoriously general to be distinctive at all. In the latter class a judge may well hesitate before making the order deeming them to be distinctive. It is not safe to rely exclusively on the protection afforded by s. 44 to persons acting in good faith. They should not be exposed even to the risk of legal proceedings without full consideration. In the absence of special circumstances or relevant evidence to qualify them the intermediate surnames seem to me as a matter of fact to be indistinctive for the purpose of the statute, which is to individualize goods, not to generalize them. I think that Joyce J. rightly refused to order that the mark "Boardman's" should be deemed to be a distinctive mark and that the appeal should be dismissed with costs. It seems to me that his formal decision, as expressed at p. 41 of the report in [1912] 2 Ch. which goes too far, goes beyond the contention advanced on behalf of the registrar, namely, that an ordinary surname is not adapted to distinguish, and I do not therefore think that there has been any such shifting of their ground by the respondents on

(1) [1891] 2 Ch. 536. (2) [1911] 2 Ch. 387.

this appeal as would justify us in interfering with the usual rule as to costs.

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Farwell L.J. The appeal will be dismissed with costs.

Solicitors: *McKenna & Co.; Solicitor to the Board of Trade.*

G. A. S.

In re VIC MILL, LIMITED.

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[No. 1 of 1909.]

March 17.

Sale of Goods—Non-acceptance—Goods ordered to be manufactured—Measure of Damages—Company—Voluntary Winding-up—Proof—Double Profit.

The Vic Company were in voluntary liquidation. Before the winding-up they had ordered certain machines to be made by a firm of engineers, which, owing to the winding-up, they were unable to accept. The creditors put in a claim for damages for 1167*l.* 13*s.* 6*d.*, being the amount of the profits which they estimated they would have made if the contract had been carried out. The liquidators rejected this claim, and Neville J. referred the matter to the district registrar for an inquiry for what sum, if any, the applicants should be allowed to prove in the winding-up in respect of the items of machinery included in their claim, ordered by the company but not delivered. The registrar divided the machines as to which claims were made into two classes: (1.) Machines which had been completed by the creditors before the date of the winding-up, retained by the creditors for a time, and then somewhat altered and sold to other customers at a price less than the contract price. On these he allowed the difference between the price realized and the contract price plus the estimated cost of the alterations, a sum amounting to 28*l.* instead of 162*l.* 19*s.* claimed. (2.) Machines which would have been wholly or partially manufactured by the creditors, on which they had done no work, but for some of which they had purchased subordinate parts ready made, which they had afterwards used in fulfilling other orders. On these the registrar thought that the creditors were entitled to have the loss of profits taken into account; but he held that the actual loss directly or naturally resulting from the breach of contract did not amount to anything approaching the whole of such prospective profit, and he assessed the damages at 280*l.* instead of the 1002*l.* 1*s.* 3*d.* claimed. There was no available market for the goods and no evidence that the claimants could not have carried out the contract as well as all their other contracts:—

Held, affirming the decision of Neville J. (reported ante, p. 183),

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that the claimants were entitled to the whole of the profits which they claimed.

APPEAL from a decision of Neville J. (1)

The Vic Mill, Limited, went into voluntary liquidation on July 12, 1909: a supervision order was made on July 27, 1909. The claimants, Messrs. Arundel & Co., were a firm of engineers from whom the company had ordered certain machinery of which, owing to the winding-up, they had not been able to accept delivery. Messrs. Arundel & Co. made a claim to prove in the liquidation for loss of profit in respect of the following items :—

	Contract Price.			Loss of Profit.		
	£	*s.*	*d.*	£	*s.*	*d.*
(1.) 4 quick traverse winding frames	465	14	0	162	19	0
(2.) 38 ring doubling frames .	5220	0	0	783	0	0
(3.) 1 gassing frame . .	287	0	0	157	17	0
(4.) 2 preparing machines .	110	0	0	55	0	0
(5.) 1 bundling press . .	22	10	0	1	2	6
(6.) 1 warping mill . . .	35	10	0	6	4	3
(7.) 1 beaming machine . .	32	15	0	1	12	9
				£1167	15	6

The liquidators rejected this claim on January 5, 1912. The claimants appealed, and Neville J. referred the matter to the district registrar for "an inquiry for what sum if any the applicants should be allowed to prove in the liquidation in respect of the items of machinery included in their claim ordered but not delivered."

On August 2, 1912, the registrar certified that the amount for which the claimants were entitled to prove was 280*l.* 15*s.* 3*d.* In a memorandum giving reasons for his certificate he stated that the amounts claimed by the claimants as the profits they would have made were not challenged by the liquidators, but the measure of damages for non-acceptance of goods was the loss directly and naturally resulting in the ordinary course of events from the breach of contract; and though the loss of prospective profit might be taken into account in assessing

(1) Ante, p. 183.

damages, he did not accept the contention that the whole of such prospective profit was necessarily to be taken as the loss.

He found, as to the facts, that the machines in item No. 1 had been completed and were ready for delivery at the commencement of the winding-up. The claimants retained the machines for some time, made some alterations, and then sold them at a net price, which was 23*l.* less than the company was to pay. He considered that the measure of damages was the difference between the contract price and that made on resale, plus the cost of alteration. He fixed that cost at 5*l.* and assessed the damages at 28*l.*

As to items 2, 3, 4 and 6 he found that the claimants had not commenced to manufacture any of these machines at the commencement of the winding-up. The ring doubling frames consisted of iron framework which the claimants would have manufactured, and spindles, rings, and rollers which they would have purchased. The spindles, rings, and rollers had been purchased by and delivered to the claimants, but they had done no work on them. These spindles, rings, and rollers were afterwards used by the claimants to complete other orders, and there was no evidence of actual loss. The cost of the spindles, rings, and rollers represented 40 per cent. of the cost of the frames complete.

The gassing frame, preparing machines, and warping mill would have been wholly manufactured by the claimants. No raw material had been purchased expressly for their manufacture. There was no evidence that the claimants' works had been wholly or partially stopped in consequence of their not manufacturing those machines, or that the orders on which the works were employed were of a less remunerative nature than the orders in respect of which the claim for damages was made. In the case of the machines in items 2, 3, 4 and 6 the registrar was of opinion that the claimants were entitled to have the prospective profits taken into account, but having regard to the circumstances he did not think that the loss directly and naturally resulting from the breach of contract amounted to anything approaching the whole of such prospective profit, and he assessed the damages for these items at 250*l.* As to items 5 and 7 he found that these machines would not have been

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manufactured by the claimants, but purchased by them and resold to the company. The amount claimed was the difference between the price they would have paid and that at which they had contracted to sell to the company. In these cases he allowed the amount claimed, 2*l.* 15*s.* 3*d.*

The claimants took out a summons to vary the certificate by allowing the full amounts claimed.

Neville J. varied the certificate by allowing to the creditors the whole amount of their claim. (1)

The liquidators appealed.

A. Grant, K.C., and *C. E. R. Abbott*, for the appellants. This appeal is not pressed in respect of the fifth and seventh items, but on the other points we submit that the decision of Neville J. was wrong. The claimants are, no doubt, entitled to damages, and the general principle is that they ought to be put into the same position as if the contract had been completed; but it is necessary to take into consideration what took place in their business. If they had bought the materials and had not been able to use them they would have been entitled as damages to the amount of the loss occasioned by the failure of the company, and for any special steps taken by them. Here the claimants did use the materials they had bought, and no pecuniary loss to them has resulted from the breach of contract; therefore the 28*l.* given by the learned registrar in respect of the first item was sufficient compensation. They did make a profit out of the materials, and cannot claim estimated profits under the contract as well, or get their profit twice.

[HAMILTON L.J. On the evidence the claimants had room in their works to carry out this contract with the company as well as all their other contracts.]

There was no evidence that the failure of the company caused a stoppage of the claimants' works or that there was a diminished output. The loss of the order does not appear to have interfered with the operations of their works. It is not enough for them to prove a general right to damages; they must shew an actual loss of their profit: *Erie County Natural Gas and Fuel*

(1) Ante, p. 183.

Co. v. *Carroll.* (1) The ordinary rule where there is an available market is that the measure of damages is the difference between the contract price and the market price: *Barrow* v. *Arnaud.* (2) There was no available market here, but that is immaterial. Damages for the breach of a forward contract to accept goods for which there is no market are the full amount of the damage actually sustained, the person who broke the contract not being put to additional cost by reason of the other party not doing what he ought to do as a reasonable man, and he on the other hand not being bound to do otherwise than in the ordinary course of his business: *Dunkirk Colliery Co.* v. *Lever* (3); Benjamin on Sale, 5th ed. p. 806. The measure of damages is the actual loss; the claimants must prove that they could not make their profit and that they have lost it altogether. In this case they have made it except 28*l.* on the first item and a small sum on items 2, 3, 4, and 6, and that is all they can recover. Their works have been employed more remuneratively, and that fact must be taken into consideration. The test is whether they have acted reasonably and done their best to mitigate the damages: *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London.* (4). There is no difference for this purpose between commodities and goods made to order.

Manisty, K.C., and *H. S. Preston*, for the claimants (called on as to the first item only). The fallacy lies in assuming that the contract for the sale of these machines to the new purchasers was substituted for the contract with the company. It was not so. The contracts were independent of each other. There is nothing to shew that we could not have carried out both contracts. In fact if there had been an available market both contracts would have been carried out. The meaning of "available market" is discussed under s. 54 of the Sale of Goods Act, 1893, in Benjamin on Sale, 5th ed. p. 806.

A. Grant, K.C., in reply, referred to *Braithwaite* v. *Foreign Hardwood Co.* (5)

(1) [1911] A. C. 105, 117.
(2) (1846) 8 Q. B. 595, 610.
(3) (1879) 41 L. T. 633. Affirmed in the House of Lords (1880) 43 L. T. 706.
(4) [1912] A. C. 673.
(5) [1905] 2 K. B. 543.

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HAMILTON L.J. I have been asked to give my judgment first. This is an appeal from a decision of Neville J., varying the certificate of the registrar, who had been directed by a previous order of the learned judge to ascertain the amount for which the applicants should be allowed to prove in the liquidation of the company. The liquidating company had given an order to the applicants, the creditors, to make a quantity of spinning machinery for their mill. The company were unable to perform the contract by taking the machinery and paying according to its terms, and finally went into liquidation; and, whether they expressly said that they were not able to perform the contract, or only intimated their inability by their conduct, the matter rests upon the footing that the selling manufacturers became entitled to, and did, treat the contract as wrongfully terminated, and themselves as entitled to damages. They claimed to prove for a certain sum for damages to which the liquidators objected, and so, in the first instance, on appeal from that rejection, the matter came before the learned judge.

There were two classes of goods. The first consisted of four quick traverse winding frames, which at the time of the final breach of the contract had been manufactured and were ready for delivery. As to the remainder, they had not been manufactured; some materials for their manufacture were in the makers' hands, but no more. Speaking for myself, although a good deal of discussion has taken place upon the law, I think there is no new question of law involved in this case, but that the appeal is determined by the facts as soon as they are appreciated. Take first the group of items, 2, 3, 4 and 6, as to which the manufacturers claimed to be entitled as for loss of profit to just over 1000*l.* "These were various classes of spinning machinery," they say, "which we had a contract to make, which we could have made, which we were ready and willing to make, and upon which we should have made 1000*l.* odd of profit; by the failure of the buyers to perform their contract the result is that we lose our 1000*l.* of profit." As to this the learned registrar held as follows: "There is no evidence that the creditors' works were wholly or partially stopped in consequence of their not manufacturing these machines, or that the orders on which the works were

employed were of a less remunerative nature than the order in respect of which the claim for damages is made. In the case of this machinery I am of opinion that the creditors are entitled to have the prospective profits taken into account in assessing the damages, but I consider, having regard to the facts stated above, that the loss directly and actually resulting from the breach of contract does not amount to anything approaching the whole of such prospective profits. I assessed the damages in respect of these machines at 250*l.*" On appeal the learned judge took the view that the sellers, the manufacturers, were entitled to have the profits that they had lost, namely, the whole of the profits that they would have made had the contract been performed.

Now there is no difference between these two propositions as to principle, because the registrar was, in his view, giving the manufacturers the profits that they had lost; but he said, "I consider, having regard to the facts stated above, that the loss directly and naturally resulting from the breach of the contract does not amount to anything approaching the whole of such prospective profits." That is to say he considered that, if the profits that would have been made by performing this contract are set against the profits that were made by performing some other contracts, the net loss of profit is reduced to 250*l.* That depends on the proposition that in substance the second class of profits could not have been made if the first contract had been performed and the first class of profits had been made. He thought he had evidence to that effect, but he had none. Consequently his assessment of 250*l.*, though not in itself surprising as a matter of business, was one unsupported by any evidence before him. It is true that there is no evidence that the creditors' works were wholly or partially stopped in consequence of their not manufacturing these machines. If that had been so, there might have been a claim for some proportion of the overhead charges attributable to the period when the works were at a standstill, when charges were running on and nothing was being made against them, because the appellants, the buyers, would not perform their contract. It is true that he found that there was no evidence that the orders on

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which the works were employed were of a less remunerative nature than the orders in respect of which the claim for damages was made. Had that been so, it might have been an alternative method of measuring the damages,—that, whereas during such and such a time they would have been working at a profit of 35 per cent. on their turnover, they were obliged to work for somebody else and could get no more than a profit of 30 per cent. But neither of those two measures arises in this case and the finding does not amount to what was required in order to support the reduction to 250*l.*, namely, a finding that the manufacturers, had they performed their contract for the Vic Mill, would have had to refuse contracts offered by other customers. The evidence on the affidavits fairly taken is evidence that the claimants' works were sufficiently large and their equipment sufficiently ample to have enabled them to perform this contract in addition to all the others that they did perform. Certainly the case is not one in which the very nature of the undertaking shews that they could not carry on more than one contract at one time. No authority has been cited for the contention that it rests upon the maker who is claiming damages by way of lost profit, not only to prove that he was ready and willing to perform, but that he was able to utilize his time, as he did, and in addition to have taken on and carried through these particular appellants' contract. As the evidence stands, there was a prima facie case that the makers could have made this profit as well as the profits on all the other contracts that they had. There was not only no evidence to rebut that, but no suggestion to the contrary was made in cross-examination. It is tolerably clear that the point really fought was whether or not there was an available market in which the goods might have been sold—a point that disappears by the admission that there was no such available market. On the first head, therefore, I think the evidence failed upon which alone the claim to 1002*l.* 1*s.* 3*d.* of profits could have been reduced; for the amount of profit which this contract contained was, as an amount, not in dispute. The judge was, therefore, right so far in varying the certificate.

The other head relates to the four quick traverse winding frames which were actually made. These are, no doubt, machines

of a type in common use, but they must be made for each customer to suit his particular requirements, to fit a particular place or to be connected with other machinery or what not. Having made the four machines in question, and being unable to get delivery of them taken and payment made, what was the seller to do? The only answer to that question is that he was to act reasonably, and then he would be entitled to such damages as would put him in as good a position as if the contract had been performed. It is conceded now that there was no available market in which the goods could have been promptly sold. It is unnecessary to discuss what the definition of such a market is. It follows that he was entitled to recover the damages directly and naturally resulting in the ordinary course of events from the buyer's breach of contract. If the goods had been broken up, or sold by auction for what they would fetch, as the learned judge surmised, the consequences to the buyers would have been considerably worse than they are. It so happened that after the repudiation of the contract by the Vic Mill another customer of the makers was prepared to place an order with them for frames of that kind and somewhat of those dimensions. They might have taken that order, fulfilled it, made their profit on it, and dealt with the frames left on their hands in any reasonable way that they could. They did in fact at a small cost adapt the frames on their hands, and with them fulfilled the order of this other customer, and so made their profit on his contract. To that extent the buyers in the present case got the benefit of the accident that another customer came forward. That was a reasonable mode of mitigating the damages, but it by no means follows that the damages are confined to the cost, a trivial one, of adapting the machines to the needs of the second customer, and the loss on resale to him, which was only 23*l.*, making 28*l.* in all. The fallacy of that is in supposing that the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders, and both profits. In fact, what they did, acting reasonably, and I think very likely more than reasonably in the interests of the Vic Mill, was to content themselves with earning the profit on the second contract at the cost of adapting the machines, which has been taken

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at 5*l.*; but they are still losers of the profit which they would have made on the Vic Mill contract, because they could, if they had been minded, have performed both the contracts, and have made the profit on both the contracts but for the breach by the Vic Mill Company of their contract. In the case, as reported below, the greater part of the discussion appears to have turned on the question whether there was or was not an available market for such goods. In the result, the learned judge was right in varying the certificate on both points; the appeal fails and must be dismissed with costs.

COZENS-HARDY M.R. I agree.

BUCKLEY L.J. I have come to the same conclusion. As regards items 2, 3, 4 and 6 which were not manufactured the respondents are, I think, entitled to the whole profit, because the appellants failed to produce any evidence to shew that if the works had been employed to execute the orders under the contract they would have been unable to execute other orders which they had received. Under these circumstances no credit need be given in respect of the employment of the works upon the other operations. As regards No. 1, where the goods were manufactured, the respondents are, I think, entitled to both profits, because they were not bound to give the appellants the benefit of another order that the respondents had received. The respondents were left with these goods on their hands. They altered them and sold them to another buyer, but they could have made, and would otherwise, I suppose, have made, other goods for that buyer, and not employed these goods for that purpose. If they had done so, they would have made both profits. I think they are entitled to them.

Appeal dismissed.

Solicitors: *Robinson & Bradley, for Brown, Briggs & Symonds, Stockport; Marston & Robinson, for W. Arthur Taylor, Manchester.*

H. C. R.

In re SEYMOUR.
FIELDING *v.* SEYMOUR.

[1911 S. 2872.]

C. A.
1912
JOYCE J.
July 2, 23.
1913
C. A.
Feb. 4, 5, 7, 10.

Gift of Chattels—Void Deed—Acknowledgment—Voluntary Gift—Knowledge of Donor—Delivery of Deed by Donor—Redelivery—Passing of Property.

On February 26, 1896, a deed of gift was executed by Mrs. S. by her attorney, S. L., by which in consideration of natural love and affection she gave to her daughter Miss S. all the pictures, chattels, and effects in her house, 5, Chesterfield Gardens, which were set out in a list made by her late husband. In 1898 her solicitor, amongst other business matters, read over the deed of gift to her and made the following note of the interview so far as it related to the deed:—"Attending you as to the deed of gift to Miss S. and you desired us to retain same on her behalf. You would have a copy made of the original inventory and would send us the original to keep with the deed. Also as to the P. A. given to" S. L. "and reminding you this had been prepared by Mr. M. and had never been in our possession." Shortly afterwards she sent the inventory to her solicitor with a note on it in her handwriting as follows: "Mr. S.'s catalogue with annotations of pictures and works of art at 5 Chesterfield Gardens now the property of Miss S." Mrs. S. subsequently changed her house and parted with some of the articles. She and her daughter lived together till in 1901 the daughter in consequence of her mental condition had to be placed under medical care. In an affidavit as to her daughter's property made in lunacy proceedings in 1902 Mrs. S. did not mention the articles the subject of the deed of gift. By her will made in 1910 Mrs. S. gave her pictures, furniture, and effects upon trust for her daughter for life and then for other persons. Mrs. S. died in April, 1911. It turned out that the power of attorney was not sufficiently wide to authorize S. L. to execute the deed of gift; and the trustees took out a summons to determine whether the chattels passed under the will or whether Mrs. S. had delivered or redelivered the deed so as to make it a valid operative instrument:—

Held by Joyce J. and by the Court of Appeal, that in 1898 there was such an acknowledgment by Mrs. S. of the deed of gift that it became a deed binding on her; that what passed must be treated as a delivery or redelivery of the deed; that her knowledge that she was doing something to validate the transaction was immaterial; and that the pictures and furniture passed to the daughter.

Mrs. Isabella Seymour, the widow of Alfred Seymour, of Knoyle House, Salisbury, resided with her daughter and only

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child Jeanne Seymour at that house and at 5, Chesterfield Gardens, Mayfair, and in 1895 and 1896 the following correspondence took place between her and her solicitor, Mr. T. P. Griffithes:—

"August 29, 1895.

"Dear Sir,—I am anxious to make over all the pictures and works of art in this house to my daughter that hereafter she may not have to pay death dues upon them. What is the legal form to be adopted? We leave directly for Knoyle House, Salisbury, so please write me a line there at your leisure.

"Yours very truly,

"Isabella Seymour.

"Penson Griffithes Esq."

"2 September, 1895.

"Dear Madam,—The best way of carrying out the gift to Miss Seymour of the pictures and the works of art at Chesterfield Gardens is by informing her that you give them to her and confirming this by a memorandum in writing which we shall be very happy to prepare for you with your permission. Of course as Miss Seymour has no residence separate from your own and it is desired to leave the pictures and articles where they are there can be no physical and outward transfer of the possession from you to her. The question whether they are hers or yours is one of fact and a memorandum such as we have suggested will abundantly evidence the fact. It would be convenient to have a list of the articles appended to the memorandum as we have no doubt they are of large value and it would make the evidence and particulars of the gift so very much clearer; besides which it would give us in an indirect way the advantage of an independent witness to the fact of the gift inasmuch as any one making the list would be informed of the purpose for which it was required. If we can be of assistance in introducing an agent for this purpose of course we shall be most happy to do so. You will be kind enough not to lose sight of the fact that if Miss Seymour should happen to die before you duties would attach upon the happening of that event as we understand it is your wish to make the gift an absolute one, so that Miss Seymour would be entitled at any time to remove the articles from

Chesterfield Gardens. We trust you will not think we are going beyond our province if we ask you to consider if any of these articles are at present in settlement, or whether they are your property with an absolute power of disposition.

"We are, dear Madam, yours faithfully,

"Chester & Co.

"Mrs. Seymour
Knoyle House
Salisbury."

"Jany. 29th, 1896.

"Dear Sir,—Your letter of December 24 has only this evening reached me. . . . .

"Death Dues.

"Do you think that you could draw up a short deed making over all the pictures and works of art in 5 Chesterfield Gardens now absolutely mine to Miss Seymour as per list made out by Mr. Seymour and in his own handwriting? My brother Mr. Leighton holds a power of attorney to sign anything for me. The list is in my safe in London and the handwriting makes it undeniable.

"Yours very truly,

"Isabella Seymour."

On February 26, 1896, a deed of gift was executed by her by her attorney, Stanley Leighton, by which in consideration of natural love and affection she gave to her daughter Jeanne Seymour all the pictures, works of art, goods, chattels, and effects then in and upon 5, Chesterfield Gardens which were set forth in a list made out by her late husband, Alfred Seymour, which list was then in the safe at 5, Chesterfield Gardens, to hold the same unto the said Jeanne Seymour absolutely as from the date of the deed of gift.

In 1898 Mrs. Seymour wrote as follows:

"June 5, 1898.

"Dear Sir,—Could you name an hour on Thursday or Friday next when you could call here. I wanted to put one or two documents into your hands and should be much obliged if you could bring with you the power of attorney made out before we left England empowering my brother to sign for us and also the

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deed of conveyance to Miss Seymour of the works of art in 5 Chesterfield Gardens.

"Yours very truly,
"Isabella Seymour.

"P. Griffithes Esq."

On June 9, 1898, Mr. Griffithes called on Mrs. Seymour and discussed various matters of business with her. He took the deed of gift with him and read it to her, and made the following note of the interview so far as it related to the deed:—"Attending you as to the deed of gift to Miss Seymour and you desired us to retain same on her behalf. You would have a copy made of the original inventory and would send us the original to keep with the deed. Also as to the P. A. given to Mr. Stanley Leighton and reminding you this had been prepared by Mr. Marston and had never been in our possession." On July 29, 1898, Mr. Griffithes received from Mrs. Seymour the inventory enclosed in a wrapper of brown paper upon which was written in the handwriting of Mrs. Seymour the following address and description of contents:—"T. P. Griffithes, Esqre., Solicitor, 36 Bedford Row. Mr. Seymour's catalogue with annotations of pictures and works of art at 5 Chesterfield Gardens now the property of Miss Seymour."

In 1903 Mrs. Seymour sold 5, Chesterfield Gardens and purchased 6, Upper Brook Street; the greater part of the pictures and works of art were removed thither; and some were taken to other houses belonging to her. In 1903 and 1904 she sold several of the pictures and presented one to the British nation. Some were not to be found after her death. From 1896 to 1901 the mother and daughter lived together, but in February, 1901, in consequence of the mental condition of Miss Seymour it became necessary to place her under medical care, and from that time till her mother's death she lived separately either in the establishment of a doctor or in a house rented for her residence. In May, 1901, a receiver of her property was appointed under s. 116 of the Lunacy Act. On January 27, 1902, Mrs. Seymour swore an affidavit in the lunacy proceedings as to the kindred and property of her daughter, but did not mention the property the subject of the deed of gift. An

inquiry was held by the Master in Lunacy, and in June, 1902, a committee of her estate was appointed.

By her will dated December 9, 1910, Mrs. Seymour gave all the furniture, books, plate, pictures, and effects in 6, Upper Brook Street and other houses to trustees upon trust for her daughter her issue and appointees so far as the rules of law would permit as if the same had been included with the real estate thereby devised, namely, for her daughter and her assigns during her life with remainder to her children as she should appoint, and in default of children for the defendant Seymour Pleydell Bouverie, and then to his son with remainders over.

Mrs. Seymour died on April 7, 1911.

It turned out that the power of attorney was not sufficiently wide to authorize Mr. Leighton to execute the deed of gift, and a summons was taken out by the trustees to determine, inter alia, the question whether the testatrix intended any of the things comprised in the deed of gift to pass by her will, and whether any and which of those things were the property of the testatrix at the time of her death. It was contended on behalf of Miss Seymour that her mother had delivered or redelivered the deed of gift and thus made it a valid operative instrument.

The summons came on for hearing before Joyce J. on July 2, 1912.

Norton, K.C., and *Schwann*, for the plaintiffs.

Hughes, K.C., and *P. M. Walters*, for the defendant Miss Seymour.

Younger, K.C., and *R. M. Pattisson*, for the defendant remaindermen.

Harman, for the defendant Ellen Roberts.

Cur. adv. vult.

1912. July 23. JOYCE J. The first question to be decided in this case really is as to the effect of an instrument dated February 26, 1896, that purports to be a deed of gift by Mrs. Isabella Seymour, the testatrix, to her daughter Miss Seymour. As I understand, there is no reason to suppose that Miss Seymour, the donee (now of unsound mind), was ever informed of the execution of the deed

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of gift or ever knew of it. This is immaterial if the instrument was duly executed as a deed by Mrs. Seymour, the testatrix, even though she retained it in her own custody and nothing was said about it to anybody. That is well settled and I do not think I need give any authority for it.

There is no ground for contending, and it was not contended, that no gift was intended by Mrs. Seymour,—although her motive is said to have been to save death duties—and notwithstanding that she has subsequently dealt with a certain number of these chattels as if they were her own property, I suppose since the daughter has been of unsound mind. But in this case I am not deciding anything as to any of the chattels which have been parted with; I am only deciding here as between the parties before me, that is to say, Mrs. Seymour's estate and Miss Seymour, who is unfortunately of unsound mind; and as between these parties the question for me to determine is, Was the instrument in question the deed of the testatrix? It was not executed by her, but by Mr. Stanley Leighton affecting to act under a power of attorney. On referring to the terms of the power of attorney, my opinion is that the power did not authorize such a transaction as this, namely, giving away chattels to the value of many thousands of pounds. If the power did authorize such a transaction, then the deed of gift is undoubtedly effectual. If it did not, then the instrument was ineffectual and void and was not in law the deed of the testatrix.

Now, if the matter is looked into I think it will be found that it may be material whether it was void or voidable. In my opinion it was void. There is evidence that the testatrix verbally again and again recognized this deed, even if she did not, verbally or by parol,—I rather think she did, either by letter or something of that sort—authorize the attorney to execute it; and it was contended (I am not sure I did not suggest it) that if there had been a hostile suit between the testatrix and Miss Seymour to determine the ownership of the chattels, there are verbal admissions by the testatrix that might have been adduced in evidence, before a jury at all events, which would determine such litigation in favour of Miss Seymour. But in my opinion such an admission, if completely proved, would not suffice. In

my opinion, if Mrs. Seymour, the testatrix, had either written a letter or signed a document saying in so many words, "Know all men by these presents that I recognize the contents of that deed," and there had been no seal to the letter, that would not have sufficed to make this instrument her deed. Nor would it suffice to prove express parol authority from the testatrix to Mr. Stanley Leighton to execute this instrument as the attorney of the lady.

There are certain things in the law which are well settled, and, as Lord Lindley said, whether you like it or not, and one is that an authority to an attorney to deliver a deed on behalf of another can only be conferred by an instrument under seal duly executed by the principal. That appears over and over again in the reports and in the case of *Powell* v. *London and Provincial Bank.* (1) But of course it was settled long before that. I think the law in this can be found without much difficulty, and it is correctly and lucidly stated, I think I may say in the treatise by Mr. Cyprian Williams and Mr. Lightwood, in what is called Lord Halsbury's Laws of England, vol. x., where anything to be known about this can be found under the heading of "Deeds." Evidence that the principal believed the attorney had power and wished him to execute it, knew he had done so and did not repudiate it, will not suffice to make the instrument the good deed of the principal. Notwithstanding that, of course, there may be cases in which under the circumstances the principal may be estopped as against certain persons acting under the deed from disputing its validity. *Tupper* v. *Foulkes* (2) was rather pressed upon me; but, if you examine the facts of that case,—it is not necessary to go through them all—it is perfectly clear to my mind that the person on whose behalf the son affected to execute would have been estopped as between those parties; that is absolutely clear. And, without going into the facts and notwithstanding all the observations and dicta in that case of the various judges, I am perfectly clear that the decision was on the ground that there had been a delivery or redelivery of the deed by the principal. As I say, the law is to be found in the earlier cases, and particularly in

(1) [1893] 2 Ch. 555.
(2) (1861) 9 C. B. (N.S.) 797.

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Goodright v. *Straphan* (1), before Lord Mansfield—although I think Bowen L.J. suggested that, after all, that might be a case of estoppel. And certainly Kay L.J. in the case of *Powell* v. *London and Provincial Bank* (2) says: "This is the argument that has been addressed to us: A delivery need not be by a physical act; the man who delivers it need not take it into his own hand and say 'I deliver this to you'; he may say when he has signed and sealed the deed, which may be in the next room, 'there is my deed which I have signed and sealed; go and take it up'; and it is said that will amount to a delivery." Then he goes on to deal with the case of there being a blank in the deed. In the present case, having looked more or less into the authorities, and particularly having studied the treatise on Deeds in the book I have mentioned, I must look to the facts appearing in the affidavit of Mr. Griffithes, who has not been cross-examined. He says in paragraph 21 of his affidavit that he took the deed of gift with him, produced the same and read it to the testatrix, and that she desired him to retain the same on behalf of Miss Seymour. Taking that statement, as to which there was no cross-examination, I have come to the conclusion that what happened on that occasion would amount to an actual delivery in fact, sometimes called a redelivery (and it is in a sense a redelivery), but a delivery in fact by the testatrix of this instrument—it being, of course, of no importance that the deed was retained by the solicitor and not communicated to or handed over to Miss Seymour; and effect must be given to it as her deed, whatever the consequences may be.

R. M.

C. A.

Mr. Seymour P. Bouverie and his son appealed. The appeal came on for hearing on February 4, 1913.

Younger, *K.C.*, and *R. M. Pattisson*, for the appellants. There has been no such redelivery of the deed as to make it valid. The power of attorney gave no power to the attorney to enter into such a deed. An attorney cannot execute a deed unless he is appointed attorney by a deed and the power of attorney itself authorizes him to execute a deed. The deed therefore was

(1) (1774) 1 Cowp. 201. (2) [1893] 2 Ch. 555, 566.

invalid. There is no case in which the redelivery of a deed originally invalid has been held to render the deed binding. Delivery is always a question of intention. In *Xenos* v. *Wickham* (1) Blackburn J. said: "No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing of the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed presently binding on him, it is sufficient . . . . Any other words or acts that sufficiently shew that it was intended to be finally executed will do." See also per Williams J. in *Tupper* v. *Foulkes*. (2) To operate as a delivery the grantor must deliver the deed as a deed. In order to find a redelivery of a deed there must be some ceremony the effect of which is to convert that which was not a valid deed into a valid deed. The person redelivering the deed must know that the deed is not valid. If the first delivery of a deed is effective there cannot be a subsequent delivery. Delivery may be effected by words alone or without words by the acts or conduct of the party, from which it can be inferred that he intended to deliver the deed as an instrument binding on him: *Thoroughgood's Case* (3); *Goodright* v. *Straphan* (4); *Powell* v. *London and Provincial Bank* (5); Norton on Deeds, p. 11.

Delivery is a question of intention coupled with an overt act. *Tupper* v. *Foulkes* (6) and *Goodright* v. *Straphan* (4) were both cases in which there had been redelivery for valuable consideration. In the former case the question was whether, in the absence of any ceremonial, there was anything which would amount to a redelivery. It is the only case where redelivery of a deed which had not been executed has been upheld.

This is a pure case of gift and equity will not assist the donee. No legal title has been established. What happened had no operation to change the property in the pictures. Mrs. Seymour never acted as if the pictures had passed. There was no such delivery of the deed as to make it effective. Stanley Leighton

(1) (1867) L. R. 2 H. L. 296, 312.
(2) 9 C. B. (N.S.) 797, 809.
(3) (1612) 9 Rep. 136a.
(4) 1 Cowp. 201.
(5) [1893] 2 Ch. 555, 563.
(6) 9 C. B. (N.S.) 797.

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was not authorized by his power of attorney to execute the deed of gift for Mrs. Seymour; what he did therefore was a mere nullity, and so it remained until 1898. What happened afterwards was not effective to make it the deed of the testatrix. Two elements are required to create a deed, (1.) sealing and (2.) delivery. It is clear there was no physical sealing of the deed. There must be an adoption of the seal by the grantor, and there was none by Mrs. Seymour. Throughout she treated the matter as if there were a valid deed in existence.

There must be an intention to deliver. In *Tupper* v. *Foulkes* (1) there was quite enough to imply delivery. Here there is nothing to shew such an intention. Mrs. Seymour after the interview in June, 1898, treated all the chattels as her own. There is no suggestion of any communication to the donee.

Hughes, K.C., and *P. M. Walters*, for the respondents. There was complete delivery of this deed of gift by Mrs. Seymour in 1898. There was the seal upon it and it was signed. When it was produced to the grantor she said "Keep that for my daughter." Almost any act or word intimating that the deed is to be operative will suffice. In Sheppard's Touchstone, 7th ed. pp. 57, 58, what is requisite for a good delivery of a deed is stated. *Rex* v. *Inhabitants of Longnor* (2) was a case of settlement of a pauper, but it was necessary there to determine whether a deed of apprenticeship had been executed and delivered, and it was held that there was both execution and delivery by the apprentice and his father, who were illiterate, although they had not signed the deed nor had it been read to them, but the pauper apprentice stated that he considered himself bound.

The law has not laid down any precise form in which delivery must be made; it can be done by words without any act of delivery: *Goodright* v. *Straphan* (3); *Hudson* v. *Revett* (4); *Tupper* v. *Foulkes* (5); *Doe* v. *Bold.* (6) The question in every case is whether the evidence is sufficient: *Powell* v. *London and Provincial Bank.* (7)

(1) 9 C. B. (N.S.) 797.
(2) (1833) 4 B. & Ad. 647.
(3) 1 Cowp. 201.
(4) (1829) 5 Bing. 368.
(5) 9 C. B. (N.S.) 797, 801, 802, 804.
(6) (1847) 11 Q. B. 127.
(7) [1893] 2 Ch. 555.

[BUCKLEY L.J. referred to *Société Générale de Paris* v. *Tramways Union Co.* (1)]

In this case there plainly was a gift by Mrs. Seymour; the pictures were in the place where they naturally would be, and it would be arguable that there was an actual transfer of the chattels but for the decision of this Court in *Cochrane* v. *Moore.* (2) That is a binding authority here, but the point may be taken elsewhere. *Kilpin* v. *Ratley* (3) is in our favour, and shews that from 1898 the pictures were in the possession of the daughter although they were not moved. It is probable that the gift was communicated to the donee, although there is no evidence that such was the case. The authorities shew that Mrs. Seymour's knowledge and intention were immaterial.

Younger, K.C., in reply. In all the cases cited in which delivery has been upheld there was valuable consideration; and the doctrine has never been applied to a voluntary gift. No change of possession has been proved. It has not been shewn that Mrs. Seymour had any intention to change the possession, and intention is a necessary element.

[HAMILTON L.J. referred to Comyn's Digest, 5th ed. vol. iv. p. 263.]

There cannot be delivery of a deed by a person who does not intend to affect the document, and no one at this time knew it was necessary: *Rex* v. *Inhabitants of Longnor.* (4)

COZENS-HARDY M.R. stated the facts, and proceeded. The question really is whether, having regard to the principles of law applicable to such cases, there is not here sufficient to justify us in saying, and in fact to bind us to say, that there was a delivery, or, as it is sometimes called, a redelivery, by Mrs. Seymour so as to make this deed of gift her deed, a deed which passed the property to Miss Seymour. In my opinion, upon the authorities which have been called to our attention, we ought to hold that that is the true result. The evidence which I have referred to is not contradicted, and cannot be contradicted. The only question is, what is the inference that we ought to draw from it? I think

(1) (1884) 14 Q. B. D. 424, 449.
(2) (1890) 25 Q. B. D. 57.
(3) [1892] 1 Q. B. 582, 585.
(4) 4 B. & Ad. 647.

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that this much is inevitable. The lady's original wish was that the daughter should have these pictures. That was a wish which she continued to hold in 1898, two years or two-and-a-half years afterwards. Whether she was aware of the invalidity of the transaction of 1896, I do not know; I am disposed to think she was not. Mr. Griffithes certainly was not aware of the invalidity of the deed; but I do not think it is necessary for present purposes to establish, as Mr. Younger invites us to do, that a conversation or transaction of this kind does not amount to a delivery unless it is made by a person who is consciously doing something to validate a transaction which, to the knowledge of the person doing the act, was invalid before, and required confirmation or redelivery. I cannot find any trace of such doctrine in the authorities which have been called to our attention.

Lord Mansfield's case, the case of *Goodright* v. *Straphan* (1), is a very strong case indeed. A married woman executed a mortgage with her husband but without fine. That, of course, was inoperative so far as her property was concerned. I do not suppose that she was aware of the invalidity of it. After her husband's death, she did various acts which amounted, the learned judge says, to "a clear acknowledgment that the deed was hers, and that she was content, the defendants should enjoy according to the terms of the deed. Therefore, we are all of opinion for the defendants, and that these facts were a confirmation of the mortgage, upon the ground of their being equivalent to a redelivery of the deed."

In the case of *Hudson* v. *Revett* (2), which is a case where there was a material alteration of the deed after it was in fact executed, Holroyd J., who tried the case, said this: "Circumstances alone might be equivalent to a redelivery." What has happened here? The deed of gift was brought to the lady by the solicitor and handed back by the lady to the solicitor; whether it reached her hands is of no moment; but, supposing it was only put upon the table, he read it out to her; that having been done in that room, it was handed back to him, and he was told to retain it for the daughter. That intention was further given effect to by her sending a few weeks afterwards

(1) 1 Cowp. 201, 204. (2) 5 Bing. 368, 371.

that which at the same time she had promised to send, namely, the elaborate catalogue of these very valuable pictures and articles, with the indorsement in her own handwriting, "now the property of Miss Seymour."

Apart from any other authority, that decision of Lord Mansfield, as explained by Holroyd J., seems to me to be quite sufficient to dispose of this case. But the decision of the Court of Common Pleas in the case of *Tupper* v. *Foulkes* (1) is an exceedingly strong case, I think a case presenting much more difficulty than the present. There "A deed was executed by a son of the defendant, thus: 'John William Foulkes for Thomas Foulkes' (the defendant). In an action upon a covenant contained in the deed, the defendant pleaded non est factum. It was proved, that, the deed being shewn to the defendant executed as above, he was asked whether his son had authority to execute it for him, and whether he adopted his son's act, to which the defendant answered in the affirmative:—Held, that this amounted to a re-delivery of the deed, and sustained the issue."

I do not propose to read again the various passages which have been called to our attention by counsel in the course of the argument, but it seems to me impossible to hold that the Court of Common Pleas did not there take the view that the important question is whether the facts amount to a statement that the deed is his. I do not find a trace of the necessity of finding anything to shew that the man making that acknowledgment was aware that, without such acknowledgment then and there made, what had taken place before would have been invalid and of no use. Erle C.J. says (2): "Does not an acknowledgment that the party is bound by the deed,—the deed being present,—amount to a delivery?"

Without reading further passages in that case, or going through the other authorities, I think there is ample to justify us in holding, as I do, that there was here such an acknowledgment, by this lady, of the deed, which, though it had purported to be executed by her attorney, was not at the time her deed—there was such an acknowledgment in the year 1898 of that being a deed binding upon her, and under which these pictures passed

(1) 9 C. B. (N.S.) 797. (2) 9 C. B. (N.S.) 804.

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to the daughter, as justifies us in treating it as a delivery or redelivery of the deed, and therefore that the pictures and furniture passed to the daughter.

That was the view taken by Joyce J. I think he was quite right, and that the appeal must be dismissed.

BUCKLEY L.J. I cannot usefully add much to the judgment which the Master of the Rolls has delivered.

I will content myself with saying that the ground upon which I think this appeal should be dismissed is that that which Mrs. Seymour did in 1898 amounted to an acknowledgment by her that the instrument which was in the room on the table was her deed, and that she intended it to take effect as her deed. That, I think, was a good delivery of the deed.

Erle C.J. in *Tupper* v. *Foulkes* says (1): "Does not an acknowledgment that the party is bound by the deed,—the deed being present,—amount to a delivery?" That is an interlocutory observation. In his judgment he says (2): "It was shewn to him as his deed, and he recognized and adopted it as a valid deed." That which took place in this case satisfies everything that is put there as being required to make it a valid deed. I may test it again by reference to the words of Lindley L.J. in *Société Générale de Paris* v. *Tramways Union Co.* (3) The Court were there holding that the blank transfer of shares which the holder had subsequently filled up and sought to register, in a case where the shares were only transferable by deed, was not the deed of the transferor. Lindley L.J. said this (4): "the transfer in its complete state was never seen by him"—that is the transferor—"nor is there any evidence to shew that he knew how it was filled up or the state in which it was, when it is contended that he ought to be treated as having redelivered it. Had there been such evidence, I should have been prepared to infer a delivery after the transfer had been duly filled up on the authority of the case of *Hudson* v. *Revett.* (5)"

Applying those words here, there is evidence that the

(1) 9 C. B. (N.S.) 804.
(2) *Ibid.*, 808.
(3) 14 Q. B. D. 424.
(4) *Ibid.*, 449.
(5) 5 Bing. 368.

instrument in its complete state was seen by the lady in the sense that it was read to her; she knew its contents. There is evidence that she knew how it was filled up; she knew the language of the deed, because it was read to her, and the state in which it was. At that interview in 1898 it appears to me that in substance she said this: "I acknowledge that as my deed; take it and keep it as such." That I think was a good delivery.

HAMILTON L.J. I infer that Mrs. Seymour intended to be bound at and from the time when she caused her solicitor to take away the deed that he had produced to her. Mr. Younger contends that, knowing now that the execution by Mr. Stanley Leighton was invalid, a fact not ascertained at the time, we should not hold the necessary intention proved, unless it is shewn, not merely that Mrs. Seymour intended to be bound, but intended to become bound then and there and for the first time; that she intended, whether she was already bound or not, and even though she were not already bound, to become bound by the act of causing her solicitor to take the deed away.

I cannot reconcile that contention with the authorities. She asked the solicitor to bring not only the deed of gift, but the power of attorney, in order that to some extent she might ascertain whether the deed of gift was already valid; it may be, to satisfy curiosity; it may be, to quiet doubts; it may be, merely from an instinct that to be businesslike one ought to see all the documents necessary to the validation of the transaction. In that state of mind, she is told that the power of attorney cannot be produced, because the solicitor has never had it; and she says: "Nevertheless"—not using the word, but intimating it by act—"Nevertheless, take this deed for my daughter," or, in other words, "Nevertheless I am bound." Only by an extreme refinement can that be held insufficient, merely because she did not try to ascertain that which no one knew at the time, which has only been discovered after considerable argument upon the terms of the power of attorney.

The decision in the case of *Tupper* v. *Foulkes* (1) is a plain

(1) 9 C. B. (N.S.) 797.

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authority to the contrary. There the party executing had before him what purported to be a deed, but did not bind him; his son, who signed for him, had no authority under seal to do so. There was no suggestion that the elder Foulkes was enlightened upon the fact that his son's authority, though existent, was nugatory, not being under seal. All that he was asked was whether he recognized and adopted the transaction; and he said he did, and thereupon, to cite only the language of Williams J. (1), "This clearly amounted to a second delivery"—that is to say, to the only delivery that was valid, though it was the second act of delivering. "It has long been established that to constitute a delivery it is not necessary that the party should take the document in his hand and say: 'I deliver this as my act and deed.' Anything to shew that he treated the deed as his deed is enough." That was said in a case where it was manifest to the whole of the Court that when he was treating the deed as his deed Foulkes was virtually treating a piece of paper that did not bind him as if it were a deed and was making it bind him then and for the first time.

In a slightly different form, *Hudson* v. *Revett* (2) is the same thing. The deed, or what purported to be a deed, was not binding because a material part of it had been left blank at the time of its purported execution. Not only is there the authority of Holroyd J. in the passage already cited, but there is a passage in the judgment of Gaselee J. (3): "The permitting this person to take the deed away for the purpose of the other parties executing it, is of itself fit to be left to the jury, as a question whether or not that was not (if a redelivery should be held to be necessary) a redelivery on the mere insertion of the sums."

Nothing that fell from the members of this Court in the case of *Powell* v. *London and Provincial Bank* (4) appears to me to raise any doubt, and indeed Lindley L.J., referring to the case of *Hudson* v. *Revett* (2), says (5): "Knowing the condition in which it was, he assented to it as his deed, and it was held

(1) 9 C. B. (N.S.) 809.
(2) 5 Bing. 368.
(3) 5 Bing. 390.
(4) [1893] 2 Ch. 555.
(5) [1893] 2 Ch. 561.

that amounted to a redelivery. I follow that, but there is nothing of the sort here." He does not say, "Knowing the condition in which it was, and that by law the omission to fill up the material blank invalidated it, he assented to it as a deed." He simply says, "Knowing the condition in which it was," that is, without further information.

In effect Mrs. Seymour, knowing that this deed had been executed by a purported attorney under the terms of a power which she had not before her and perhaps had never read, and knowing that she could not get to see it, because her solicitor had not got it, nevertheless said virtually, "I will not wait to see the terms of this; I am satisfied; take this for my daughter"; and a little later, confirming the impression that she was under at the time, she indorses "These pictures are my daughter's," or words to that effect, upon the brown paper.

Some stress has been laid upon her subsequent conduct: that she made an affidavit after her daughter became of unsound mind, specifying what the daughter's property was, and not including these pictures; that she moved the pictures about apparently without consulting the daughter; that she had the enjoyment of them herself often to the exclusion of the daughter, who was no longer living with her; that she sold some and even gave one to the National Gallery of British Art. This is said to be evidence that at the material date, the date of this interview, she did not intend to bind herself afresh, but at most supposed she was bound already and could not get out of it. That all seems to me to have a very simple explanation. Many people think that by the device of what is called putting property in somebody else's name they can evade the obligations of the revenue. All this had its origin in her desire that hereafter her daughter might not have to pay death duties upon the pictures. That is quite a sufficient explanation to my mind of all her subsequent conduct.

The only remaining suggestion that has to be noticed is the suggestion that there is here sufficient evidence to dispense with any deed of gift at all. On the contrary there is no evidence of that whatever, and the point was only faintly indicated and not really argued.

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I agree that the judgment of Joyce J. is correct and ought to be affirmed.

Solicitors: *Chester, Broome & Griffithes*; *Hores, Pattisson & Bathurst*; *Trower, Still, Parkin & Keeling.*

H. C. R.

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JOHN BRINSMEAD & SONS, LIMITED *v.* BRINSMEAD.

[1912 J. 356.]

Practice—Action tried in Chancery Division with Witnesses—Form of Order—Appeal—Schedule of Evidence—Action against Two Defendants—Submission to Judgment at Trial by One of Defendants—Dismissal of Action as against other Defendant—Evidence to be included in Schedule—Oral and Documentary Evidence—Names of Witnesses—Rules of the Supreme Court, 1883, *Order* LXII., *r.* 14C.

Where after the trial of an action in the Chancery Division with witnesses the judgment is appealed against the schedule of evidence required by Order LXII., r. 14C, is a complete schedule of the evidence used at the trial and not merely a schedule of the evidence relative to the particular point under appeal. The schedule should contain a list of the documents used together with the names of the witnesses examined, the object of the rule being to put in a separate document where there is an appeal the evidence which under the former practice was entered in the body of the order appealed from.

General observations as to the practice to be followed in drawing up orders.

ADJOURNMENT to the judge under Order LXII., r. 14C. (1)

The action was brought by the plaintiffs against two separate

(1) Order LXII., r. 14B, provides that: "In all actions or matters tried in the Chancery Division with witnesses the judgment or order shall unless the judge for some special reason otherwise direct be drawn up without entering the evidence."

Rule 14C: "If any judgment or order as last aforesaid be appealed, it shall be the duty of the appellant within four days after service of the notice of appeal to take an appointment before the registrar for the purpose of settling a schedule of the evidence used at the hearing. In settling such schedule the same procedure shall be followed as hereinbefore provided with regard to the drawing up of orders. If there shall be any dispute between the parties as to what evidence shall be entered as read, the matter shall be adjourned to the judge before whom the action

defendants, Edward George Stanley Brinsmead and Waddington & Sons, Limited.

The plaintiffs by their statement of claim alleged that the defendants were passing off pianos manufactured by the defendant Brinsmead as and for pianos manufactured by the plaintiffs. By paragraph 7 they further alleged that the defendants had conspired together to pass off pianos made by the defendant Brinsmead as pianos made by the plaintiffs. They claimed (1.) an injunction restraining the defendants from manufacturing, selling, offering for sale or otherwise dealing in any pianos as "Brinsmead" pianos which were not of the manufacture of the plaintiffs, and from using the name of "Brinsmead" on any pianos without adding an express statement that such pianos were not of the manufacture of the plaintiffs, or without otherwise clearly and sufficiently distinguishing the same from pianos manufactured by the plaintiffs, and from using the name "Brinsmead" in connection with the manufacture, sale, or hiring of any piano without adding an express statement that the person using the name was distinct from and had no connection with the plaintiffs; (2.) damages; and (3.) costs.

The action was tried before Warrington J. on January 27, 28, 29 and 30, 1913.

On the case being opened counsel for the defendants Waddington & Sons, Limited, stated that they were willing to submit to judgment in the terms of the prayer in the statement of claim if the charge of conspiracy were withdrawn. The plaintiffs refused to withdraw the charge and the action proceeded, and a considerable body of evidence was adduced with a view of proving the alleged conspiracy between the defendants. Warrington J. held that there was no evidence to support the charge of conspiracy and dismissed the action against the defendant Brinsmead and granted

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or matter was tried and he shall decide the question in dispute and may give such directions as to the costs of the adjournment as he may think fit. Subject to such direction (if any) the costs of settling the said schedule shall be costs in the appeal. The schedule of evidence shall be signed by the registrar but shall not be entered nor shall the judgment or order be amended so as to incorporate the same unless the Court of Appeal shall so direct."

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an injunction against the defendants Waddington & Sons, Limited, as asked by the statement of claim.

The formal order, which was dated January 30, 1913, was prefaced with the following words: "This action coming on for trial on the 27th 28th and 29th days of January 1913 in the presence of counsel for the plaintiffs and for the defendants and upon hearing the pleadings in the action and the evidence read and upon hearing what was alleged by counsel for the plaintiffs and for the defendants" &c.

The plaintiffs had given notice of appeal against this order so far as it directed the action against the defendant Brinsmead to be dismissed, and asked that it might be ordered that he be restrained from manufacturing, selling, offering for sale or otherwise dealing in any pianos as "Brinsmead" pianos which were not of the manufacture of the plaintiffs and from using the name "Brinsmead" on any piano without adding an express statement that such piano was not of the manufacture of the plaintiffs or without clearly and sufficiently distinguishing the same from pianos manufactured by the plaintiffs.

A dispute having arisen between the plaintiffs and the defendant Brinsmead as to what evidence should be entered in the schedule of evidence required by Order LXII., r. 14C, the matter was under that rule adjourned to Warrington J., as "the judge before whom the action or matter was tried," to decide the question in dispute.

Ashton Cross, for the defendant Brinsmead. As the appeal relates only to the defendant Brinsmead, no evidence bearing on the charge of conspiracy ought, it is submitted, to be included in the schedule of evidence required by Order LXII., r. 14C. If all the evidence used at the trial is entered in the schedule the costs of the appeal will be thereby enormously increased. The scheduled evidence ought to be strictly confined to the evidence relating to the conduct of the defendant Brinsmead and relevant to the appeal.

[WARRINGTON J. If I take your view and direct that only such documents as are relevant to the appeal are to be entered, who is to decide which of them are material?]

It is submitted that under Order LXII., r. 14D, the plaintiffs

might be directed to give notice to the defendant Brinsmead which of the documents used on the hearing they intend to read on the appeal. This would protect him.

[WARRINGTON J. That rule only applies where the parties have agreed at the trial that a bundle of documents should be treated as put in.]

The plaintiffs propose to include in the schedule of evidence certain hire-purchase agreements put in in connection with the case of the defendants Waddington & Sons, Limited. If these are included the defendant Brinsmead will be compelled to take copies of these documents and thereby be put to considerable expense although the documents will not be admissible as evidence against him.

W. Copping, for the plaintiffs, was not called on.

WARRINGTON J. This is an adjournment to me, as the judge before whom the action was tried, of a dispute between the parties as to what evidence is to be entered in the schedule of evidence used at the trial. The adjournment is under Order LXII., r. 14c, which I will read directly. The defendant Brinsmead contends that what is called in the rule the "schedule of evidence" should contain only the evidence relative to the particular point under appeal.

The position with regard to the action is this: it was an action brought by the plaintiffs against two separate defendants, Edward George Stanley Brinsmead and Waddington & Sons, Limited. As against both defendants it was an action for passing off. There was also an allegation against the two defendants of conspiring to pass off, and there was an entirely separate claim against the defendant Brinsmead for an injunction restraining him from using the name "Brinsmead" in connection with pianos of his own manufacture, without stating that they were not of the manufacture of the plaintiffs. With regard to that last claim against the defendant Brinsmead and the claim against him of passing off the action was dismissed. With regard to the claim of passing off as against the defendants Waddington & Sons, Limited, those defendants submitted to an injunction. With regard to the charge of conspiracy, that charge failed.

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The plaintiffs have given a notice of appeal that the judgment may be reversed so far as it directed the action against the defendant Brinsmead to be dismissed, and ask for an injunction directed only to the use by the defendant Brinsmead of the name "Brinsmead." That is the nature of the appeal. The question, therefore, to be determined on the appeal is one only of the questions that were raised in the action, and one only of the questions raised with regard to the defendant Brinsmead. The notice of appeal asks for that particular injunction. It is that particular limited form of the notice of appeal which has given rise to the contention on behalf of the defendant Brinsmead that the schedule of evidence should be limited in the way I have mentioned.

I come now to the rules. The question arises under Order LXII., rr. 14A, 14B, 14C, and 14D, which are included in the Rules of the Supreme Court of July, 1911. Prior to these rules it had been the practice of the Court of Chancery and of the Chancery Division following the Court of Chancery to enter in every order a statement of the evidence on which the order was pronounced. That practice had been found to involve very considerable delay in the drawing up of orders, and I suppose it was thought—speaking from the internal evidence afforded by these new rules—that the delay and expense of settling the detailed schedule of the evidence used at the hearing were unnecessary, except in cases where the order was to be appealed, because where there was to be no appeal there was no occasion for any future reference to the details of the evidence upon which the judgment was pronounced. There was a further abuse, if one may call it so, which was sought to be met by these new rules, namely, the delay which is sometimes occasioned by the neglect of the parties in drawing up orders. These rules were then made, and the first of them (r. 14A) was intended to meet the abuse to which I have just referred. It limited a time within which orders were to be drawn up, and provided that certain consequences should follow if they were not drawn up within that time. I need not read the details of the rule because they are not relevant to the particular question I have now to decide. Then comes r. 14B. [His Lordship read rr. 14B and 14C, and continued:] It is not necessary

for the present purpose to read the next rule, which provides for cases where the parties agree at the hearing that a bundle of documents shall be treated as put in, without reference to the question whether each document is evidence or not, and gives to the Court of Appeal power to visit with costs any expense occasioned by giving notice to read or supply unnecessary documents. With that I have nothing to do. What I have to do is to determine what is the duty of the registrar in settling the schedule of evidence used at the hearing.

Now, prior to this rule, the judgment contained a complete statement of all the evidence used at the trial, without any attempt to distinguish the issues on which any particular evidence—whether viva voce or documentary—was adduced, and I think most wisely, because if any attempt had been made thus to analyse the evidence, the delay and expense occasioned in drawing up orders would have been even greater than they have in fact been.

I am asked in this case to say that the registrar is to do that which was never done under the practice existing before the framing of these new rules. Do the rules introduce this new practice? That is really the question I have to decide. In my opinion they clearly do not. In the first place, r. 14B and r. 14C are to be read together. Rule 14B directs the omission from the judgment as drawn up of any evidence. Rule 14C provides, in my opinion, merely that if the order is appealed there shall be a schedule of evidence, and that that schedule of evidence shall be schedule of the evidence used at the hearing and nothing else. The rule does not say a schedule of such of the evidence used at the hearing as is relevant to the appeal, but of the evidence used at the hearing. And if I were to say that under the new rule the practice is such as Mr. Ashton Cross asks me to say it is, I should be introducing in the settlement of this schedule an abuse which was avoided under the old practice. I should be introducing a new occasion for delay and expense in settling every judgment that was appealed from, where there was more than one issue or more than one defendant, and where the appeal was only on one issue or against one defendant. I decline to do that. The schedule of evidence ought properly to contain

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JOHN BRINSMEAD & SONS, LIMITED v. BRINSMEAD.

the evidence used at the hearing; nothing more, and nothing less.

I wish to say a word as to the mode in which the judgment in the present case has been drawn up. Rule 14B says that the judgment is to be drawn up without entering the evidence. I take it that that means without stating what the evidence was, and the registrar in drawing up the present judgment has taken that view, that is to say, he has drawn it up, not without reference to any evidence at all, but without stating what the evidence was. He has drawn it up in this way: "This action coming on for trial the 27th 28th and 29th days of January 1913 in the presence of counsel for the plaintiffs and for the defendants and upon hearing the pleadings in this action and the evidence read and upon hearing what was alleged by counsel for the plaintiffs and for the defendants" &c.

With one exception, it seems to me that that is the correct form in which the judgment ought to be drawn up. I do not, however, think that it was right to say "upon hearing the evidence read," because that would appear to confine it to the documentary evidence, whereas the judgment was pronounced upon evidence partly oral and partly documentary. I think that the judgment would be properly drawn up under these new rules if it were drawn up in the form used on this occasion, with the words "upon hearing the pleading and the evidence adduced before the Court," or some such expression as that, "and upon hearing what was alleged." I only make these remarks because the registrar informs me that in some cases judgments are drawn up without reference either to the pleadings or to the evidence. I do not think that that is right. I think the proper form would be, "upon hearing the pleadings and upon hearing the evidence."

There is one other matter I must mention. The draft schedule of evidence which has been handed to me contains documentary evidence only. I think that the proper course in settling the schedule is to enter not only the documentary evidence, but also the names of the witnesses. The schedule is to be a complete schedule of the evidence used at the hearing, and I think it ought to contain the names of the witnesses, as was always the case in the old judgments. To put it shortly, I think that the object of these

rules is to put into a separate document, where there is an appeal, and only where there is an appeal, the evidence which used to be entered in the body of the order. I must give that direction on this adjournment, and I must order the defendant Brinsmead to pay the costs of the adjournment.

Solicitors: *Lea & Lea; Walter Maskell & Nisbet.*

W. I. C.

In re MIDLAND EXPRESS, LIMITED. PEARSON *v.* THE COMPANY.

[1912 M. 1340.]

Company—Debentures—Floating Charge—Pari passu Clause—Interest paid to some Holders down to a later Date than to others—Distribution of Assets in Debenture-holder's Action—Claim by other Holders to be paid Difference in Interest in full.

Where debentures are charged by way of floating security to rank pari passu as a first charge on the property of the company "without any preference or priority over one another," and when the security comes to be enforced in a debenture-holder's action it appears that some debenture-holders have been paid interest by the company while a going concern down to a later date than other debenture-holders, the latter (in the absence of some express provision to that effect) are not entitled to have the assets applied in equalizing the amount of interest before any further distribution is made, but the amount found due to each debenture-holder for principal and interest ought to be calculated down to the date of the Master's certificate and the assets ought to be distributed rateably according to the amounts so found due.

FURTHER CONSIDERATION.

This was a debenture-holder's action in which the usual judgment was given on June 4, 1912, and which now came on for further consideration.

The company (which was now in liquidation) had issued a series of debentures to the amount of 100,000*l.*, of which 70,000*l.* carried interest at the rate of 5 per cent. and 30,000*l.* carried interest at the rate of 4½ per cent., the interest on these 30,000*l.* debentures being payable only out of profits and if and when the profit and loss accounts kept by the company should shew profits available for the payment of such interest.

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The debentures were in the following form:—

1. "The Midland Express Limited (hereinafter called the company) will on the first day of November 1921 or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon pay to or other the registered holder for the time being hereof the sum of £ ."

2. "The company will during the continuance of this security pay to such registered holder interest thereon at the rate of £ per cent. per annum by half-yearly payments on the 1st day of May and the 1st day of November in each year . . . ."

3. "The company hereby charges with such payments its undertaking and all its property present and future including its uncalled capital."

4. "This debenture is issued subject to and with the benefit of the conditions indorsed hereon which are to be deemed part of it."

By the conditions indorsed on the debentures it was provided:

1. "This debenture is one of a series of debentures of the Company for securing the principal sums not at any time exceeding £ . Such debentures are all to rank pari passu as a first charge on the property hereby charged without any preference or priority over one another and such charge is to be a floating security but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures. Such debentures are to be for such amounts respectively and are to be issued at such dates as may be arranged between the company and the respective subscribers for the same."

10. "The principal moneys hereby secured shall immediately become payable:—

"(*a*) If the company makes default for a period of one calendar month in the payment of any interest hereby secured.

"(*b*) If an order is made or an effective resolution is passed for the winding up of the company."

11. "At any time after the principal moneys hereby secured become payable the registered holder of this debenture may with the consent in writing of the holder of the majority in value of the outstanding debentures of the same issue appoint by writing

any person or persons to be a receiver or receivers of the property charged by the debentures and such appointment shall be as effective as if all the holders of debentures of the same issue had concurred in such appointment. And a receiver so appointed shall have power

"(1.) To take possession of the property charged by the debentures

"(2.) To carry on or concur in carrying on the business of the company

"(3.) To sell or concur in selling any of the property charged by the debentures

"(4.) To make any arrangement or compromise which he or they shall think expedient in the interests of the debenture-holders

And all moneys received by such receiver or receivers shall after providing for the matters specified in the first three paragraphs of clause 8 of section 24 of the Conveyancing and Law of Property Act 1881 be applied in or towards satisfaction pari passu of the debentures And the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sections 19—24 of the said Act which provisions so varied shall be regarded as incorporated herein."

There was no trust deed.

The 70,000*l.* 5 per cent. debentures were issued as to 34,500*l.* part thereof to various members of the Tangye family, as to 20,000*l.* other part thereof to C. A. Pearson, and the remaining 15,500*l.* to the Daily Express Company, Limited. The 30,000*l.* debentures carrying 4½ per cent. interest out of profits only had been issued to the Birmingham Daily Gazette Company, Limited.

On October 11, 1910, C. A. Pearson, the Daily Express Company, Limited (which had since gone into liquidation), and the Birmingham Daily Gazette Company, Limited, charged the debentures issued to them respectively to secure the payment of a sum exceeding 10,000*l.* to the Darwen Paper Mill Company, Limited.

The property subject to the debentures had now been sold, and the total assets available for distribution between all the debenture-holders amounted to some 12,464*l.* only.

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Down to October 31, 1906, the members of the Tangye family had been paid the interest, or the greater part of it, on their debentures by the company while a going concern; but there were large arrears in respect of unpaid interest down to that date on the debentures issued to C. A. Pearson and the Daily Express Company, Limited, part of such interest being in arrear from November 1, 1902. Since October 31, 1906, no interest had been paid to any of the debenture-holders. As regards the 30,000*l.* debentures issued to the Birmingham Daily Gazette Company, Limited, no profit had ever been made out of which the interest was to become payable, and no interest had become payable in respect thereof.

By the draft of the proposed minutes of the order on further consideration it was proposed to apply the available assets in the first place to equalize interest down to October 31, 1906, upon the debentures other than those issued to the Birmingham Daily Gazette Company, Limited, and to divide the residue between the members of the Tangye family and the Darwen Paper Mill Company, Limited, in proportion to the capital due on all the debentures. The members of the Tangye family objected to this method of distribution and contended that the amount due to each debenture-holder for principal and interest should be first ascertained and the available assets applied in payment pari passu of the amounts so found due.

C. W. Turner, for the plaintiff.

A. Grant, *K.C.*, and *W. M. Cann*, for the Darwen Paper Mill Company, Limited. The proposed minutes follow the usual practice, which is correctly stated in the Annual Practice, 1913, p. 961, as follows: "In taking the account of what is due to debenture-holders it is not usual to calculate interest to date of the [Master's] certificate if it is clear the assets will be insufficient to pay the principal in full, but if some debenture-holders have been paid their interest to a date later than others, such others should have their interest ascertained down to the date when some debenture-holders have been paid, as they are entitled to be paid their arrears of interest before anything further is paid to those who have had interest paid to the later date." That is supported

by the form of order made in an unreported case of *In re Chaffey Brothers* [1896 C. 2320] which is stated in Stiebel's Company Law and Precedents at p. 627. The terms of the issue are that the debentures are "all to rank pari passu and without any preference or priority over one another"; and if some of the debenture-holders have obtained a preference over others in respect of interest, that should be put right when the charge comes to be enforced. By clause 10 of the conditions the charge was enforceable by Pearson and the Daily Express Company, Limited, within a month after the failure to pay their interest on November 1, 1902, though it is true that they took no steps to enforce it. The charge in the present case is in the nature of a floating security upon the whole undertaking and property of the company, and the payments of interest must necessarily have been made out of capital as the company never earned any profits, and the effect of the additional payments to the Tangye debenture-holders has therefore necessarily been to diminish the common fund. The operation of the pari passu clause is discussed in Palmer's Company Precedents, 11th ed. pt. iii. p. 143, who puts a pari passu issue of debentures on the same footing as a contributory mortgage under which all the contributories must share and share alike, citing *Fairtitle* v. *Gilbert.* (1) See, too, Companies (Consolidation) Act, 1908, s. 104; Buckley on Companies, 9th ed. pp. 258, 259; and *Bowen* v. *Brecon Ry. Co.* (2) We rest our argument, first, on the broad principle that equality is equity, and when a debenture-holder comes in to share in the common fund he must make good any preferential payment received by him, in the same way as a creditor or a legatee in administration proceedings; and, secondly, on the express provisions of condition 1. [They also cited Palmer's Company Precedents, 11th ed. pt. iii. p. 82; *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (3); and *Illingworth* v. *Houldsworth* (4) on the nature of a floating security.]

Gore-Browne, K.C., and *J. E. Harman*, for members of the Tangye family. There is no authority for the statement cited

(1) (1787) 2 T. R. 169.
(2) (1867) L. R. 3 Eq. 541.
(3) [1897] A. C. 81.
(4) [1904] A. C. 355.

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from the Annual Practice, 1913, p. 961, in accordance with which the draft of the proposed minutes has been prepared. It is no doubt often provided in a trust deed for securing the debentures that the available assets shall be distributed in the way contended for, and that may be the explanation of the order in *In re Chaffey Brothers* stated in Stiebel's Company Law and Precedents at p. 627; but, in the absence of an express provision to that effect, there is no principle on which such a distribution can be supported. Until the security crystallizes the company is at liberty to carry on its business, and the payment of interest by the company to a debenture-holder is a payment made in the ordinary course of conducting its business. The doctrines relating to the administration of trust property have nothing to do with the present case. The debenture-holder in such circumstances who succeeds in getting his interest paid does not obtain an additional security, but only an advantage to which his greater importunity entitles him. The view for which we contend was impliedly recognized in *In re J. Defries & Sons, Ld.* (1) Condition 1 indorsed on the debentures does not alter the case. The equality there provided for is equality of charge, and the first step is to find out what is due to each debenture-holder for principal and interest, and then to apply the pari passu distribution to the amounts so found due. Condition 11 indorsed on the debentures relating to the appointment of a receiver excludes the operation of clause (iv.) of sub-s. 8 of s. 24 of the Conveyancing Act, 1881, which relates to payment of interest, and under that condition the moneys in the hands of the receiver are to be applied in "satisfaction pari passu of the debentures," which means in satisfaction pari passu of the moneys secured by the debentures at the time when the moneys are paid.

A. Grant, K.C., in reply. In *In re J. Defries & Sons, Ld.* (1) there was no suggestion of any deficiency in assets or of any question of priority arising thereout. Condition 11 indorsed on the debentures has no real bearing on the point before the Court. Under the Conveyancing Act, 1881, s. 24, sub-s. 8, income only is dealt with, while condition 11 deals with principal as well,

(1) [1909] 2 Ch. 423.

which is the reason for excluding clause (iv.). [He also referred to *Evans* v. *Rival Granite Quarries, Ld.* (1) and *Smith* v. *Law Guarantee and Trust Society.* (2)]

SARGANT J. This is a question which arises in the winding up of a company, and one which I am surprised to find has never been decided. The question is this. There are a number of debentures secured by an ordinary floating charge on the whole of the property of the company; the debenture-holders are practically divided, as Mr. Turner tells me, into four classes, firstly Mr. Pearson, secondly the Daily Express Company, Limited, thirdly the Birmingham Daily Gazette Company, Limited, and fourthly, various persons who are collectively described as Tangyes. Speaking generally, the first three sets of debenture-holders are represented by the Darwen Paper Mill Company, Limited, who have an arrangement with them under which the Darwen Paper Mill Company, Limited, is entitled to a charge on their debentures and any dividend coming to those three persons or companies. The Tangye debenture-holders have in fact been paid interest down to a later date than the other debenture-holders. I need not give the dates or the names of the particular debenture-holders, but these are the salient facts which raise the question which I have now to decide.

The assets are insufficient, and the minutes of order which have been prepared under the direction of the Master provide that the available assets are to be applied first in paying 20*s.* in the pound on the arrears of interest of those debenture-holders who have not received as much interest as the Tangye debenture-holders; and then, after that preferential payment has been made, the assets are to be divided speaking generally amongst all the debenture-holders in proportion to the capital due on their debentures. It is said to have been the practice, and the statement is supported by a precedent to which I have been referred in Stiebel's Company Law and Precedents at p. 627, to adopt that method of distribution in cases where interest has been paid to certain debenture-holders down to a later date than

(1) [1910] 2 K. B. 979. (2) [1904] 2 Ch. 569.

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to others. The material clause or clauses of the debentures which provide for the distribution of the trust fund are as follows: Clause 3 on the face of the debentures provides, "The company hereby charges with such payments its undertaking and all its property present and future including its uncalled capital." Those payments I may observe are not only payments of the principal, but payments of interest on the principal. Clause 1 of the conditions indorsed on the debentures provides, "This debenture is one of a series of debentures of the company for securing principal sums not at any time exceeding £ . Such debentures are all to rank pari passu as a first charge on the property hereby charged without any preference or priority over one another and such charge is to be a floating security but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures." Clause 11 of the conditions was also referred to in the course of the argument, but I do not think that it affords me much assistance for the present purpose. The first question I have to ask myself is this: What are the payments due to the debenture-holders which are secured by that charge and in respect of which this distribution is to be made without any preference or priority? In answering that question literally it seems to me that, if the amounts due to the other debenture-holders, that is to say, the debenture-holders other than the Tangyes, exceed the amount due to the Tangyes by these arrears of interest, the natural result will be that these arrears of interest will go to swell the total sum claimed by the debenture-holders other than the Tangyes and that a dividend will be paid on these arrears of interest together with the capital of the debt. Assuming that this had been a mortgage not of the whole property of the company but of some specific part of the property of the company, that must undoubtedly have been the result, because when a mortgagor pays his mortgagee interest no one can inquire out of what fund in fact that payment is made, or whether the mortgagor obtained the money which he applied in paying his mortgagee from the particular property which is mortgaged. There is no trust or anything of that kind in the mortgagor to pay his mortgagee out of the mortgaged property, and certainly if the practice which

has been spoken of in a debenture-holder's action has prevailed with regard to cases where a specific part only of the property of the company has been charged in favour of the debenture-holders, in my opinion that practice must be clearly wrong, but it may be that the practice has not prevailed in a case of that character.

It is said that in this case the result must be different for the reason that the charge is a charge upon the whole of the assets and property of the company and therefore any payments made to the debenture-holders who have had their interest paid down to a later date than others must have been met out of these assets, which, as Mr. Grant suggests, are practically the trust property. He argues that though the payment was not wrongful at the time it was made, still, when the trust property now comes to be administered, the previous payment must be regarded as having been made out of that trust property at previous stages of its existence, and therefore the payments must now be levelled up so as to make good out of the trust property to the debenture-holders not previously paid the payments in respect of interest which they failed to receive. In my opinion that would really amount not to a distribution without any preference or priority, but to a distribution with a preference or priority, although it may no doubt be described as a preference or priority which is intended to remedy a previous inequality. But in my opinion the whole argument is unsound for this reason, namely, that until a debenture-holder has appointed a receiver, until the property has materialized, the property of the company subject to the debentures cannot be considered in any sense as trust property or as a fund to be administered for the benefit of the debenture-holders generally. There can be no doubt that a charge by way of floating security leaves the company absolutely and entirely free to deal with its property in the ordinary course of business until the security crystallizes; and I do not see how it can be properly said that the payment of interest on debentures is not an application of the property of the company in the ordinary course of its business. Accordingly, the payment of interest at any particular date is a payment out of a fund which may be, and certainly was in the present case, very different from

SARGANT J. the fund which has ultimately to be administered on the appointment of a receiver.

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The case is different from one put by me in the course of the argument, namely, that of the administration of the estate of a deceased person where some creditors have been paid in part by the executors. In that case, contrary to my impression at the time of the argument, the rule is settled that in the event of an ultimate deficiency the partially paid creditors cannot share until the other creditors have received the same proportion of their debts: *Mitchelson* v. *Piper* (1); *Lowthian* v. *Hassel.* (2) But there the determining date is the testator's death; and there are not present what seem to me the decisive elements here, namely, first, the precise language in the debentures as to the method of distribution, and secondly the general character of the agreement between the company and their debenture-holders under which the company may deal freely with their property in the ordinary course, and the fund for payment of the debenture-holders is to be the property of the company as existing and ascertained at a particular moment.

In the present case it looks to me as if some of the debenture-holders may have been more friendly to the company than others and for that reason may have abstained from pressing the company, and in such a case it is a little hard anyhow on the remaining debenture-holders if that state of things goes on for any length of time, since they may find themselves met not merely by a competing claim for the principal on the other debentures, but by a claim for large arrears of interest of which they have no suspicion. If the Court were to go further than that, as it is now asked to do, and say that large arrears of interest which have been left to accumulate owing to the friendliness of certain debenture-holders ought to be paid in full before any distribution takes place amongst the debenture-holders generally, I think that in some cases the hardship would be almost intolerable.

In my opinion, therefore, the proper order in the present case is as follows: The amounts due for principal and interest ought to be calculated down to July 22, 1912, the date of the

(1) (1836) 8 Sim. 64. (2) (1793) 4 Bro. C. C. 167.

Master's certificate, and the assets ought to be distributed pro rata in accordance with the amounts found due. In the case of the debentures issued to C. A. Pearson, the Daily Express Company, Limited, and the Birmingham Daily Gazette Company, Limited, the payments will be made to the Darwen Paper Mill Company, Limited, subject to this, that an opportunity ought to be given to the official receiver, the liquidator of the Daily Express Company, of making an objection to that payment, and I order that no distribution shall actually be made to the Darwen Paper Mill Company in respect of the Daily Express debentures for three weeks from now, and that in the meantime notice be given to the official receiver in order that he may have an opportunity of making any objection if he thinks fit. As regards the 30,000*l.* debentures which do not carry interest the amount to be ascertained in respect of them will be the principal of the debentures, and in respect of all the other debentures the principal with interest down to July 22, 1912.

Solicitors: *Carter Harrison & Armstrong; Haslam & Sanders, for Hindle, Son & Cooper, Darwen; E. Flux, Leadbitter & Neighbour, for Slater & Co., Darlaston.*

A. C.

SARGANT J.

1913

March 6, 13.

In re ACKERLEY.

CHAPMAN *v.* ANDREW.

[1913 A. 107.]

Will—Power of Appointment—Special and General Power over same Property —Exercise of Special Power.

In order to exercise a special power of appointment there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it; and either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose. Where, however, two powers exist in reference to the same property it may well be that a reference to the property will not indicate any intention to exercise more than one of the powers.

Testatrix, by her will proved in 1909, gave one moiety of her residuary estate in trust for her daughter, with a direction that the income thereof was to be held in trust for her daughter during her life, and after her death the capital thereof was to be held, subject to the appointment of any life interest to any future husband of the daughter as thereinafter mentioned, upon trust for the children of the daughter living at her death who being sons should attain twenty-one, or being daughters should attain that age or marry, with a provision that if no child should attain a vested interest the share should be held in trust absolutely for such persons as the daughter should by will appoint, and in default of appointment for the testatrix's son; and the testatrix thereby empowered her daughter by deed or will to appoint for the benefit of any future husband who might survive her during his life or any less period all or any part of the income of her share.

The daughter's first husband died in 1910, the only issue of that marriage being a daughter, who was born in 1898. In the year 1910 the testatrix's daughter married A. C., her second husband. She died in 1912, having made a will whereby she appointed A. C. guardian of her infant daughter and proceeded: "I give, devise, appoint and bequeath, all my estate, property and effects, whatsoever and wheresoever, both real and personal, which I have power to dispose of by my will, to my said husband, A. C., absolutely, and I appoint A. C. sole executor of this my will":—

Held, that the daughter's will executed the special power of appointing the income of her share in favour of her second husband during his life.

ADJOURNED SUMMONS.

The following statement of the facts is taken from his Lordship's written judgment:—This is an originating summons taken

out for the purpose of obtaining a declaration that by her will dated August 18, 1911, one Lilian Sarah Chapman, deceased, who was the wife of the plaintiff Arthur Chapman, exercised a special power conferred upon her by the will of Margaret Ackerley, deceased, of appointing the income of her share in the estate of the said testatrix in favour of the plaintiff, and that by virtue of such exercise the plaintiff is beneficially entitled during his life to the income of the said share.

The will by which the power in question was created is dated December 21, 1908, and contained a gift of the residuary estate of the testatrix upon trust as to one moiety thereof for her daughter the said Lilian Sarah Chapman, then Lilian Sarah Andrew, with subsequent directions for the settlement of the share. Under this settlement the income of the share was to be held for the daughter during her life, and after her death the capital thereof was to be held, subject to the appointment of any life interest to any future husband of the daughter as thereinafter mentioned, upon trusts for the children or child of the daughter living at her death who being sons or son should attain the age of twenty-one years or being daughters or daughter should attain that age or marry and for the issue of any deceased child as therein mentioned, with a proviso that if no child or issue should attain a vested interest under that trust the share should be held in trust absolutely for such persons or person as the daughter should by her last will or by any codicil thereto appoint, and in default of and subject to any such appointment absolutely for the testatrix's son, the defendant George Reid Ackerley. And the testatrix thereby empowered her daughter notwithstanding any of the trusts thereinbefore contained from time to time or at any time while not under coverture by any deed revocable or irrevocable and whether covert or sole by will or codicil to appoint to or for the benefit of any future husband to whom she might be thereafter married and who might survive her during the residue of his life or any less period all or any part of the annual income of her share.

The testatrix Margaret Ackerley died not long after the date of her will, and it was proved on March 2, 1909. Mr. Andrew, the first husband of Mrs. Chapman, died on February 11, 1910.

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The only issue of the first marriage of Mrs. Chapman was a daughter, Margaret Ackerley Andrew, who was born on February 13, 1898, and is still an infant. She is one of the defendants to this action. On December 31, 1910, the testatrix's daughter was married to the plaintiff, and she died on December 25, 1912, without having had any further child, and leaving a will dated August 18, 1911, under which the present question arises. By this will she appointed the plaintiff to be the guardian of her infant child during his life, and after his death appointed another person in his stead. The will proceeds in the following terms, namely, "I give, devise, appoint and bequeath, all my estate, property and effects, whatsoever and wheresoever, both real and personal, which I have power to dispose of by my will, to my said husband Arthur Chapman, absolutely, and I appoint Arthur Chapman sole executor of this my will."

Martelli, K.C., and *R. H. Hodge*, for the plaintiff. The will of the daughter operated as an exercise of the special power to appoint the income of her share in favour of the plaintiff during his life. In the first place the use of the word "appoint" and the express reference to property which she had "power to dispose of by will" point to the special power, since the contingent general power was well exercised by s. 27 of the Wills Act without any reference to the power. In the second place the plaintiff was the sole object of the power and there is no difficulty arising from any excessive exercise in regard to the objects. In the third place there was no other property over which the testatrix had any power of appointment. These considerations are amply sufficient according to the authorities to shew an intention to execute the special power notwithstanding the use of the words "my estate" and "absolutely" and notwithstanding the existence of a general power arising under the same instrument and over the same property as the special power: *Ferrier* v. *Jay* (1); *In re Teape's Trusts* (2); *In re Sharland* (3); *Banks* v. *Banks* (4); *Cowx* v. *Foster* (5); *In re Mayhew* (6); *Kent* v. *Kent.* (7)

(1) (1870) L. R. 10 Eq. 550.
(2) (1873) L. R. 16 Eq. 442.
(3) [1899] 2 Ch. 536.
(4) (1853) 17 Beav. 352.
(5) (1860) 1 J. & H. 30.
(6) [1901] 1 Ch. 677.
(7) [1902] P. 108.

The last two cases shew that the mere use of the word "appoint" may be a sufficient indication and are not affected by *In re Richardson's Trusts* (1) and *In re Weston's Settlement* (2), where there were other counterbalancing considerations. Moreover the observations of Chatterton V.-C. in *In re Richardson's Trusts* (1) were dissented from by Farwell J. in *In re Mayhew*. (3)

A. Grant, K.C., and *R. J. White*, for the infant daughter. The will shews no intention to execute the special power or to do more than to execute the contingent general power in the event of the death of the infant child before attaining a vested interest. The general rule is stated in Farwell on Powers, 2nd ed. p. 183, as follows: "General words of appointment will be a sufficient reference to a limited power, if the donee have no other, and if the appointee be an object of the power," which rule involves the negative proposition that general words of appointment are insufficient, if the donee have a general power, in the absence of other indications in the will: *In re Weston's Settlement* (2); *In re Cotton*. (4) The use of the word "appoint" is still an appropriate way of exercising a general power notwithstanding s. 27 of the Wills Act: *In re Mills*. (5) The Irish case of *In re Richardson's Trusts* (1) is directly in point and shews that the special power was not executed. *In re Mayhew* (3) is distinguishable, as that was what may be called a one-power case, whereas the present case is a two-power case and the words of the will are satisfied by referring them to the general power with which the words "my" and "absolutely" coincide. *Kent* v. *Kent* (6) is not in point. In *In re Sharland* (7) a distinct intention was shewn to execute all powers. In *Roake* v. *Denn* (8) Alexander C.B. in delivering the opinion of the judges says: "In no instance has a power or authority been considered as executed, unless by some reference to the power or authority or to the property, which was the subject of it; or unless the provision made by the person intrusted with the power would have been ineffectual, would have had nothing to operate upon,

(1) (1886) 17 L. R. Ir. 436.
(2) [1906] 2 Ch. 620.
(3) [1901] 1 Ch. 677.
(4) (1888) 40 Ch. D. 41.
(5) (1886) 34 Ch. D. 186.
(6) [1902] P. 108.
(7) [1899] 2 Ch. 536.
(8) (1830) 4 Bli. (N.S.) 1, 17.

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except it were considered as an execution of such power or authority." That test is still applicable to a special power and shews that the special power was not well exercised in the present case.

Moreover it is highly improbable that the mother intended practically to disinherit her only child during the lifetime of the stepfather, and that is a special consideration entitled to some weight in the present case.

Tyldesley Jones, for the trustees.

Cur. adv. vult.

March 13. SARGANT J. delivered a written judgment in which, after stating the facts as above set out, he continued: It is conceded that this will undoubtedly exercises the general power of appointment which the testatrix had over the settled property in default of any child or issue attaining a vested interest therein. The point for decision is whether it also exercises in favour of the plaintiff the special power given to Mrs. Chapman by her mother's will of appointing a life interest in the settled fund to any future husband. The settled fund is of considerable value, producing an income of some 1600*l.* per annum. Some evidence has been filed to shew that the property actually owned by Mrs. Chapman was of small value and mainly consisted of chattels. But such evidence seems to be inadmissible for the purpose of ascertaining the presence or absence of an intention to exercise a power. (See Theobald on Wills, 7th ed. p. 127, and the cases there cited, particularly *Higgins* v. *Dawson*. (1)) I have arrived at my conclusion altogether apart from this evidence.

It is often said that in order to exercise a special power there must be either (1.) a reference to the power, or (2.) a reference to the property subject to the power, or (3.) an intention otherwise expressed in the will to exercise the power. (See Theobald on Wills, 7th ed. p. 248, and *In re Weston's Settlement*. (2)) This is no doubt a good practical way of stating the rule. But when more closely examined the first two alternatives are seen to be in reality only particular examples of the rule embodied in the third

(1) [1902] A. C. 1. (2) [1906] 2 Ch. 620, 624.

alternative, as, indeed, is implied in the use in that alternative of the word "otherwise." And accordingly I should prefer to state the rule thus, namely, that in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it; and that either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose. I say "in general" because, for instance, where, as here, two powers exist with reference to the same property, it might well be that a reference to the property would not indicate any intention to exercise more than one of the powers.

It is now necessary to consider the particular will in this case. On doing so the first thing that strikes one is that the mind of the testatrix is addressed primarily to power and not to property. Indeed there is in terms no gift at all of property owned by the testatrix; and I am inclined to think that her own absolute property would pass under this will only by virtue of the fact that property which she owned was necessarily by virtue and as an incident of such ownership property over which she had a power of disposition. Further, the will indicates a strong general intention to benefit the plaintiff as far as possible, an indication which would not, in my opinion, be satisfied by the mere appointment to the plaintiff of a contingent reversionary interest in the fund in case his stepdaughter should not attain a vested interest therein. And, lastly, there is not here, as in many cases, any presumption against the exercise of the power such as arises from the trusts declared being in part for persons or purposes not within the power.

Mr. Grant, in his argument against the exercise of the power, laid some stress on the intention of Mrs. Ackerley to provide primarily for her grandchild and on the improbability that Mrs. Chapman should have intended to leave her only daughter penniless, that is, without any income during the life of her stepfather. But the answer to this is clear. The grandmother authorized in express terms the creation of such a limitation as that which is objected to; and so far as Mrs. Chapman is concerned her mind when she made her will was obviously directed towards her husband rather than her daughter, and she may well have

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considered that Mr. Chapman would provide properly for her daughter out of the income of the Ackerley fortune. It is noticeable that he was appointed her guardian. But the main stress of Mr. Grant's argument was based on the rule quoted from Farwell on Powers (2nd ed. p. 183) that "General words of appointment will be a sufficient reference to a limited power, *if* the donee have no other, and if the appointee be an object of the power," and on the contention that the whole of the words of Mrs. Chapman's will are completely satisfied by referring them to her own property and her general power of appointment over the ultimate interest in the trust property in question, and that some of these words, notably the word "my" and the word "absolutely," are hardly properly applicable to the life interest which Mrs. Chapman was entitled to appoint to her second husband; and, further, a decision by Chatterton V.-C. in *In re Richardson's Trusts* (1) is relied on as completely covering the present case.

In my opinion the case of *In re Richardson's Trusts* (1) is very different, because there the words were "give, devise, bequeath and appoint." So that they dealt primarily and mainly with ownership and only secondarily, if at all, with power; while here the words are, as above pointed out, primarily, if not exclusively, directed to power. Further, as regards the quotation from Farwell on Powers, there are, in my opinion, present in this case sufficient indications to shew that the testatrix was intending to exercise this special power. As regards the use of the word "absolutely" this may easily be referable to the desire of the testatrix to shew that her husband was to take unconditionally, and in fact the appointment if operating under the special power would be absolute in the sense of giving the fullest estate that could be created under the power (see *In re Teape's Trusts* (2)); and as regards the use of the word "my" it is conceded that here the word is applied to an interest over which Mrs. Chapman had a general power of appointment only, and it may almost, if not quite, as properly be applied also to an interest over which she had a special power only. But in any case the word "my" is easily applied to property, or interests in property, in which the appointor had herself a life interest.

(1) 17 L. R. Ir. 436. (2) L. R. 16 Eq. 442.

Since the close of the argument I have consulted that learned and accurate if somewhat neglected work, Chance on Powers, and the following two paragraphs in the second volume seem to me singularly appropriate. They are to be found at p. 90, and are numbered 1649 and 1650. "Commonly there can be no doubt of an intention to execute a power where a party peaks of all 'the' property which he has power to dispose of, whatever may be the case, if the words are all 'my' property. Cases may however arise, particularly on limited powers, where, though the donee has a power of disposition to a certain extent, still he is not authorized to make the dispositions actually appearing in the instrument containing the words referred to; and then the question will occur, whether the general expressions are not to be confined. In respect to the use of the word 'my,' however inaccurate this may be as applied to many cases, it clearly cannot prevent an instrument operating as an execution of a power, provided the intention be plain." Then 1650: "In most cases involving the question under consideration, the testator has a life interest in the lands, so that in one sense they are his, though as such an interest is not disposable by will, they are not his with reference to the contemplated dispositions. Where a testator has a devisable interest in the estate, as a reversion or partial interest, it seems that, in some cases, even though there are no other lands, the interests in question may be sufficient to answer the words, so as to prevent the power being held to be exercised; this may depend on circumstances, and particularly on the nature of the limitations." Since these two passages were penned, there have been two decisions of *Bailey* v. *Lloyd* (1) and *Cowx* v. *Foster* (2), which shew how little importance is to be attached to the word "my" in such a connection as the present, and are strong authorities in favour of the exercise of the power here; and besides these cases *Ferrier* v. *Jay* (3) and *In re Sharland* (4) tend in the same direction, and, indeed, are stronger cases than the present, since there were difficulties there in the way of holding the power to be exercised which are not present here. The last two cases were what Mr. Grant has conveniently called two-power

(1) (1829) 5 Russ. 330.
(2) 1 J. & H. 30.
(3) L. R. 10 Eq. 550.
(4) [1899] 2 Ch. 536.

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cases. In *Bailey* v. *Lloyd* (1) and *Cowx* v. *Foster* (2) the appointor, in addition to the special power, owned a remote interest in the property the subject of the power.

Accordingly I am satisfied that the special power was exercised here, and I propose to make a declaration in accordance with the first part of the declaration asked by the summons. The costs of all parties as between solicitor and client will come out of the capital of the fund. By the first part of the declaration I mean: "A declaration that by her will dated August 18, 1911, the said Lilian Sarah Chapman exercised the power conferred upon her by the will of the above-named Margaret Ackerley of appointing the income of her share in the estate of the said testatrix in favour of her husband the plaintiff."

Solicitors: *Julius A. White; Brunskill & Alton; Woodcock Ryland & Parker.*

A. C.

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[1911 S. 4138.]

Charity—Hospital—Consecrated Chapel—Rebuilding—New Chapel—Effect of Consecration.

Land once consecrated is consecrated for ever, or at any rate until an Act of Parliament divests it of its sacred character; and no secular Court has power to grant a faculty for the use of it for secular purposes, although the Ecclesiastical Courts have jurisdiction to grant faculties, in their discretion, for the erection of buildings and the like in consecrated ground in certain circumstances.

In re Bideford Parish [1900] P. 314, and *Corke* v. *Rainger and Higgs* [1912] P. 69, approved in preference to *Campbell* v. *Paddington Parishioners* (1852) 2 Rob. Eccl. 558.

About 1750 a society (which had no trust deed and was not incorporated) was formed of the subscribers towards the foundation of an infirmary for the benefit of the sick and lame poor of certain counties, and in 1752 a lease of land was granted to trustees for the society for a term of years subsequently renewed until 1951.

On this land an infirmary was erected, and one of the rooms in the

(1) 5 Russ. 330. (2) 1 J. & H. 30.

building was appropriated as a chapel and was consecrated by the bishop of the diocese in 1754. From 1754 Church of England services were regularly conducted in the chapel by a chaplain who was a clergyman of that Church and down to 1859 was appointed by the governors of the society, receiving 10*l.* a year under an endowment of the chaplaincy. In 1859 a lady settled a yearly stipend on the chaplain, who was to be appointed by her trustees, and from 1882 to 1906 a further but smaller annual sum was paid to him out of the society's general funds.

In 1897 (when the society had a written constitution embodied in statutes and rules which recognized and provided for services of the Church of England only in the chapel) the citizens of N., in which the infirmary was situate, subscribed 100,000*l.* to commemorate the Diamond Jubilee of Queen Victoria by building a new infirmary on the site and in lieu of the existing building. But a citizen of N. offered 100,000*l.* to the governors towards building a new infirmary on a site different from that of the old infirmary on condition that the subscriptions to the new infirmary building fund became available for the general purposes of the institution and that another 100,000*l.* should be subscribed. This offer was accepted, the lease of the old infirmary was surrendered under authority of an Act of Parliament which also enabled the corporation of N. to give a new site for the proposed infirmary, and, in 1901, another donor gave 100,000*l.* to be used for the building or endowment of the new infirmary as might seem best to the governors. The new site was conveyed to trustees as a site for the new infirmary, but without any express declaration of trust, and on this site, under the supervision of a building committee appointed by the governors, the new infirmary was built at a cost which absorbed the two sums given by the two individual donors. The plans provided for a chapel, the cost of building which came out of the subscribed funds generally, but the organ, altar, reredos, pulpit, lectern, furnishings and windows were provided by special donations from members of the Church of England. The building committee never considered the question of consecration. On the invitation of the house committee of the infirmary and the petition of the trustees the bishop of the diocese consecrated the chapel:—

Held, that, as the trustees had the bare legal estate and no powers, and the house committee's functions, under the society's constitution, were confined to the administration and management of the infirmary, the invitation to the bishop would have been ultra vires the committee if the old chapel had not been consecrated; but that, as the prima facie intention of all parties was to reproduce as nearly as might be the state of things existing in the old infirmary, the committee had performed merely the ministerial duty of inviting the bishop to perform the ceremony necessary to give effect to that intention by replacing the old consecrated chapel through the consecration of the new one, and that an action for a declaration that the chapel was held on trust for the general purposes of the charity, including the holding therein

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of religious services, whether of the Church of England or otherwise, failed.

THIS action was brought by William Sutton and others, suing on behalf of themselves and all other the governors (other than such of the defendants as were governors) of a charity called the Royal Victoria Infirmary for the Sick and Lame Poor of the Counties of Newcastle-upon-Tyne, Northumberland, and Durham; the defendants being Thomas Bowden and two others (governors of the charity), Lord Armstrong and others (the present trustees of the charity), and the Attorney-General; and the claim of the plaintiffs was for a declaration by the Court that on the true construction of the Newcastle-upon-Tyne Corporation (New Infirmary Site) Act, 1898 (61 & 62 Vict. c. ccxxvii.), and a deed of 1900 conveying a new site for the infirmary, and in the events which had happened (and notwithstanding the dedication service and instrument below referred to), the new infirmary and the site thereof were vested in the present trustees or some of them upon trust to permit a certain building on part of the site constructed for use as a chapel, and the site of the chapel, to be used for the general purposes of the charity, including the holding therein and thereon of religious services for the benefit of the objects of the charity (whether the same were religious services of the Church of England or otherwise), and that the defendant trustees were bound to comply with the directions of the governors of the charity in general court assembled, or other the governing body for the time being, with respect to the purposes of the charity for which the chapel building and its site were to be used.

The statement of facts referred to in the judgment of Farwell L.J. contained the following allegations:—

In or about 1750 a movement was set on foot for the erection of an infirmary in Newcastle-upon-Tyne for the benefit of the sick and lame poor of the counties of the town of Newcastle-upon-Tyne and of Durham and Northumberland, and funds were raised by public subscription, and a building was erected at Forth Banks, Newcastle-upon-Tyne, on a site demised by the mayor and burgesses of Newcastle-upon-Tyne (below called "the corporation").

This lease was dated January 2, 1752, and was made between

the corporation of the one part and the Earl of Carlisle, the Earl of Tankerville, and other noblemen and gentlemen (below called "the lessees") of the other part. The lease, after reciting that an infirmary had been lately set on foot and was carried on at Newcastle for the benefit of the sick and lame poor of the town of Newcastle and of the counties of Durham and Northumberland, and that "in order to promote the said charity" the corporation had agreed to demise to the parties thereunto "in trust for a society who called themselves the governors of the infirmary at Newcastle erected for the benefit of the sick and lame poor of the said town of Newcastle and the counties of Durham and Northumberland aforesaid the parcell of ground hereinafter . . . . described with liberty to erect and build thereon an infirmary or public hospital for the use and purposes aforesaid," witnessed that the corporation demised unto the lessees, their several and respective executors, administrators, and assigns, a piece of waste ground situate without the walls but within the liberties of the town of Newcastle-upon-Tyne called the Forth Banks, "with full and free liberty power and authority to erect and build upon the said waste ground or any part thereof for the purposes aforesaid an infirmary or public hospitall and all other necessary buildings and erections whatsoever" together with the appurtenances, to hold the land "and all and every the liberties priviledges and powers hereby granted and demised or mention'd or intended so to be" unto the lessees, their executors, administrators, and assigns, "in trust nevertheless for the said society who are called or known as aforesaid by the name of the governors of the infirmary Newcastle erected for the benefitt of the sick and lame poor of the said town and of the said counties of Durham and Northumberland," from May 1, 1751, for the term of ninety-nine years, "if the premises hereby demised shall so long continue to be made use of and employed as an infirmary or public hospital for the use and purposes aforesaid," at the yearly rent of 2*s.* 6*d.*

The lessees covenanted to pay the rent, rates, and taxes and to keep the demised property in repair, and that "if at any time during the term . . . . the said premises shall cease to be made use of as a public infirmary according to the true intent and

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meaning of these presents" the lessees would, on demand, surrender the term and deliver up possession.

The corporation covenanted for quiet enjoyment and that if at all times during the term and at the determination thereof the demised premises should have then and should continue to be made use of as a public infirmary as aforesaid the corporation and their successors would for the purposes therein mentioned upon the request of the lessees give them and the survivor or survivors of them, their executors, administrators, and assigns, a further lease of the demised premises for the further term of ninety-nine years as from the determination of the term thereby granted at the yearly rent, covenants, and agreements therein and thereby reserved and contained, and would for the purposes aforesaid from time to time thereafter upon the like request renew the lease of the same at the same yearly rent, covenants, provisions, and agreements so long as the premises continued "to be used and employed as for a public infirmary as aforesaid and no longer, nor for any other use or purpose whatsoever."

The statement of facts also alleged that at the date of this lease the town of Newcastle was in the diocese of Durham, and there was no record in the registry of the diocese of Durham, or at the town hall, Newcastle-upon-Tyne, of the assignment of the demised premises to any ecclesiastical authority or trustees for ecclesiastical purposes, and that the lease did not bear any memorandum of the chapel in the infirmary having been consecrated.

In pursuance of the covenant a further lease, dated October 27, 1852, of the hospital premises for a term of ninety-nine years was granted to John Hall and others for a term of ninety-nine years from May 1, 1850, at the yearly rent of 2*s.* 6*d.* This lease contained a proviso for re-entry if (amongst other things) the lessees should "use the said buildings for any other purpose than a public infirmary" without the previous consent of the mayor of Newcastle.

The statement of facts pointed out that in the lastly-mentioned lease the lessees were not referred to as trustees for the society; that there was no declaration of trust or covenant for further renewal; that there was no specific mention of the then existing

chapel in the infirmary; and that the lease did not bear any memorandum of the chapel having been consecrated.

By another lease, of the same date and between the same parties, some adjoining land was demised (with liberty to erect thereon buildings "to be used as an extension and for the purposes of an infirmary") for seventy-five years from March 25, 1852, at a yearly rent of 21*l.*

John Hall, the last surviving lessee, died in June, 1899, having by his will appointed certain persons his executors and trustees.

In 1906 part of the demised property was sold and conveyed to a railway company; and by a deed dated July 9, 1908, to which the executors and trustees of Hall, the trustees of the hospital, and the corporation were parties, after reciting that in accordance with s. 5 of the Act of 1898 the trustees desired to surrender the premises comprised in the two existing leases, it was witnessed that Hall's executors surrendered, and the trustees of the hospital surrendered and confirmed to the corporation the demised premises, to the intent that the terms should be merged and extinguished.

After stating the above facts in great detail the statement of facts continued as follows:—

"A print of the first annual report for the period from April 13 1751 to April 7 1752 . . . . sets forth that the Lord Bishop of Durham was grand visitor and that the management was entirely in the hands of the governors who were either annual subscribers of 2*l.* 2*s.* or upwards or benefactors of 20*l.* or more at one time. A general court of governors was held four times a year for transacting the extraordinary business of the society inspecting the accounts and appointing a committee consisting of the treasurer and thirty-six governors whose business it was to meet every Thursday to receive reject or discharge patients and to direct all matters concerning the expenses government or conduct of the infirmary or of the officers and servants belonging to it. The infirmary has from its inception been and now is a society of governors of whom there are at present more than 1000 and the society is not incorporated or registered under any Act of Parliament or constituted by any

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trust deed. The written constitution of the infirmary is and has been from the first contained in statutes and rules. The statutes can only be altered or repealed by the governors but the rules may be altered or repealed by the house committee of the governors hereinafter mentioned. Certain revised statutes and rules were promulgated in 1896 and were in force on 19th September 1906 the date of the service of consecration of the new chapel and continued in force until new statutes were substituted for the old ones in 1907. In 1910 another new set of statutes was substituted for those of 1907 but not since 1896 has there been any alteration in the rules hereinafter referred to. Prints of the statutes and rules of 1896 (hereinafter called 'the statutes' and 'the rules') and the later rules are sent herewith."

The following statutes were then set out or referred to as being material:—

Statute I., stating the name of the society.

Statute II. "The officers of the infirmary shall consist of a patron, a grand visitor, six presidents, eight vice-presidents, a treasurer, consulting physicians and surgeons, consulting dental surgeons, not exceeding four honorary physicians, four honorary surgeons, four assistant surgeons, one pathologist, one pathological and analytical chemist, one dental surgeon, a surgical registrar, a junior house physician, four house surgeons, and an assistant house surgeon. Also the following paid officers:—A house governor, a chaplain, a senior house physician, an anæsthetist, a secretary, an accountant, a matron (who shall also be superintendent of nurses), an assistant matron (who shall act as housekeeper), and a dispenser."

Statute III. "Subscribers of 2*l.* 2*s.* or more a year shall be governors during their subscription. Benefactors of 20*l.* or more at one time, previous to June 17, 1869, are and shall be governors for life. Benefactors who have since that date contributed 30*l.* or more, at one time, are and shall be governors for life. The consulting physicians and surgeons, the honorary physicians and surgeons of the institution shall be honorary governors so long as they remain in office, and shall have the same rights and privileges as other governors. Every religious or civil institution, mercantile or other firm, society or corporate

body giving a benefaction of 20*l.* or upwards at one time may nominate one of their body, to whose life the privileges shall be limited. Any person bequeathing a legacy of 50*l.* or upwards may by his or her will nominate a life governor; and the minister of any church, chapel, or any other place of divine worship, or any person collecting or paying in at one time a collection of 20*l.*, or upwards, shall be a life governor. And any such minister paying a smaller sum shall be entitled to be a governor, for the current year, in respect of any sum of not less than 10*l.* so collected. The workmen in each society, shipyard, factory, workshop, or department, subscribing in the aggregate 10*l.* to the funds of the infirmary, shall be entitled to nominate one person as a governor for every 10*l.* contributed during the year immediately preceding. The following alternative provisions shall apply to the workmen in any society, etc., whose aggregate subscriptions in one year shall not amount to 10*l.*:—(1.) They may amalgamate their several aggregate subscriptions, and such amalgamated subscriptions shall be taken as one subscription enabling them jointly to nominate a governor or governors under the preceding clause. (2.) They may, when the sum of their aggregate subscriptions for two or three successive years shall amount to 10*l.*, nominate one person as a governor for the year immediately succeeding."

Statute IV. "There shall be a house committee consisting of thirty-seven governors, in addition to the consulting physicians and surgeons, fourteen of whom shall be elected at the annual meeting. The four honorary physicians, the four honorary surgeons, and the honorary treasurer shall, so long as they continue in office, be members of the house committee. Two annual members shall be appointed by the Newcastle City Council. Twelve members shall be the nominees of the working men, elected by the working men governors at a meeting specially held for that purpose. The house committee (of whom six shall be a quorum) shall meet on the first Thursday in every month at the infirmary. All other governors may attend the meetings of the committee, and shall have liberty to speak but not to vote."

Statute V. "General courts of the governors shall be held

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four times every year, namely: on the first Thursday in February (which shall be the annual court), May, August, and November, to receive the reports of the house committee and of the auditors, and to transact such other business as shall be brought before the court."

Statute VIII. (Providing that the house committee was to elect a weekly committee of sixteen, three to be a quorum, and that the weekly committee was to appoint sub-committees to superintend the various departments such as admission, organization and discipline, diet, nursing, stores, library, drugs, instruments, finance, and visiting, and to meet every Thursday at the infirmary to receive reports of these sub-committees and for the transaction of other business.)

Statute XXIII. "Whenever the office of chaplain shall become vacant the trustees for the time being of the endowment fund given by the late Mrs. Ann Blackwell shall have the exclusive right of appointing a successor, who shall be a clergyman of the Church of England. There shall always be five trustees of the said endowment fund, two of whom shall be clergymen of the Church of England and the other three shall be laymen, and all of whom are required to be governors for the time being of the infirmary. And whenever a vacancy shall occur in the trusteeship by death, resignation, incapacity, or otherwise the same (subject to the above qualifications) shall be filled up within six months by the surviving or continuing trustees or trustee, or if none, then by the executors or administrators of the last deceased trustee. Neither of the clerical trustees for the time being shall be eligible for the office of chaplain. The chaplain shall be liable to be removed from his office by the trustees for the time being at any time upon their giving to him six calendar months' previous notice in writing."

Statute XXIV. (Providing for alteration of the statutes by the governors at a quarterly or special court.)

Statute XXV. (Providing for alteration of the rules by the house committee.)

The statement of facts stated that the duties of the house committee and of the weekly committee were prescribed by the rules as follows:—Rule 10. "The chairman shall direct the

names of the governors present to be registered and the minutes of the last meeting to be read, and shall after confirmation sign them. The minutes of the weekly committee for the intervening weeks shall be then read and if approved be confirmed. They shall see what former orders of the general courts or of the house or weekly committee remain without being carried into effect, and shall transact generally the affairs of the institution." Rule 11. "The duties of the weekly committee shall be:—In the absence of chairman or vice-chairman of the house committee to elect a chairman for the day, who, after having ordered the names of the governors present to be registered and the minutes of the preceding committee meeting to be read, shall on confirmation sign them." The weekly committee were to attend to various other routine matters therein particularly specified, such as calling for lists of admissions and discharges and vacant beds, examining and paying all tradesmen's bills, and examining and if approved signing all requisitions for articles wanted in the infirmary, receiving reports of sub-committees on drugs, &c., appointing house visitors, referring abuses to the house committee, and inspecting reports of physicians and surgeons. By rule 12 it was provided that the treasurer should not pay any sums of money belonging to the infirmary unless by an order from the house committee or weekly committee, and that all cheques should be signed by the chairman for the day and countersigned by the secretary. Rule 17 prescribed the duties of the chaplain or as stated in the margin of the rule "Conditions of Appointment" as follows:—

"1. The chaplain for the time being shall by the direction of the governors perform the duties prescribed by an indenture bearing date December 4 1758 made between Sir Walter Blackett Bart. of the one part and Ralph Sowerby Esq. Mayor of Newcastle of the other part viz.:—'He shall perform divine service and administer the sacrament and pray with and visit the sick and lame poor patients in the infirmary.' He shall give two services on every Sunday and one service on every Wednesday the length of each service and the proper hour for conducting the same to be left to the discretion of the house committee. He shall give generally four hours attendance daily

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and at all events not less than three hours for the purpose of giving spiritual relief or instruction to the inmates. He shall reside within the borough of Newcastle-upon-Tyne and not at a greater distance than one mile from the infirmary. He shall not accept of any other permanent duty excepting one Sunday evening lectureship. He shall at all times be at liberty to resign his office on giving six calendar months notice in writing to the house committee."

"3. He shall be at liberty, when unable to attend, to appoint as his deputy any minister lawfully licensed by the bishop to officiate within the diocese but if such appointment be for more than one month he shall obtain the previous consent of the house committee."

By rule 31 as to in-patients it was provided (section 4) that all patients able to attend divine worship at the infirmary chapel were invited, and that those who were not members of the Church of England were not required to attend against their will, but were at liberty to have free intercourse with the ministers of their respective denominations at hours within the general regulations of the infirmary.

There was no provision in the statutes or the rules—said the statement—which expressly authorized the weekly committee or any other committee to take so important a step as proceeding with the consecration of the new chapel as afterwards mentioned.

Neither in the statutes nor in the rules was there any mention of or reference to trustees of the infirmary, and although in the special Act of Parliament there was mention of "the trustees of the infirmary," there was no document containing any declaration of any trusts.

The statement of facts then continued as follows :—

"For a long time past it has been the practice for the funds of the infirmary to be invested in the names of certain individuals as trustees for the infirmary and these persons may be and doubtless have been occasionally referred to loosely as the infirmary trustees, but as there has never been any deed of trust in connection with the infirmary there are no general trustees. The trustees of the invested funds have probably been nominated by the house

committee, but no records of the deaths of trustees and of the appointment of their successors have been kept in the minutes of that or any other committee except in the case of the latest appointment. Appointments of new trustees have not been made by deed. The investment trustees do not hold any meetings nor have they as such any power to and accordingly they do not take any part in the management of the institution. Their sole function is to hold the investments as bare trustees for the infirmary subject to the direction and control of the governors. When the conveyance of the site of the new infirmary was being prepared it was necessary to insert in it the names of certain individuals as grantees in trust for the institution" and a list of the persons in whose names the investments belonging to the infirmary then stood was given and their names were inserted in the conveyance as grantees. The statement continued: "There is no collective body which answers to the description of 'the trustees of the infirmary' the term used in the said Act. The application by the trustees to the Bishop of Newcastle-upon-Tyne . . . . for the consecration of St. Luke's Chapel in the new infirmary as hereinafter mentioned was not made in exercise of any power declared in any statute rule or other document, nor in consequence of any request or authority by the governors. There has been no conveyance by the surviving trustees of the site of the new chapel to the Ecclesiastical Commissioners, or other ecclesiastical authority, or trustees in order to give effect to the sentence of consecration or for any other purpose. The surviving trustees had no power or authority from the governors or otherwise to execute any such conveyance. The trustees had no power to interfere with or control the appointment of the chaplain nor any control over his stipend."

The statement of facts then referred to the consecration of the chapel in the old infirmary, on the petition of the governors of the infirmary, by the Bishop of Durham on October 18, 1754, and stated that this chapel was a room on the second floor of the old infirmary fitted up with appropriate furniture.

The statement then continued as follows:—

"The petition appears to have been signed by five governors

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and the secretary of the infirmary and it would seem from the foregoing petition made by and in the name of the governors and from the extracts from the minutes that the consecration of the chapel was approved beforehand by the governors at their court held on October 1, 1754, after the consecration of the chapel and burial ground had been particularly considered and approved by the house committee who made the arrangements for the consecration."

After setting out a copy of the sentence of consecration of the chapel and of the burial ground, the statement proceeded as follows:—

"The cost both of the chapel which was part of the infirmary itself and of the furniture and fittings for it was defrayed out of the general funds of the infirmary, and until this infirmary ceased to be used as hereinafter mentioned the chapel and the furniture and fittings were always maintained at the expense of the general income of the infirmary, and services were conducted in the chapel by a chaplain who was a clergyman of the Church of England."

The statement then referred to the chaplaincy endowment, including the settlement by Mrs. Tulloch referred to in his Lordship's judgment, and said that "for a great number of years prior to 1859 a chaplain was appointed by the governors of the infirmary and he was always a clergyman of the Church of England"; that "in the year 1896 the then mayor of Newcastle-upon-Tyne made a proposal for the commemoration of the Diamond Jubilee of Her late Majesty Queen Victoria by raising a fund of 60,000*l.* (afterwards increased to 100,000*l.*) for the purpose of building a new infirmary in Newcastle-upon-Tyne for that city and the counties of Northumberland and Durham on the site of the existing infirmary"; that "on October 6, 1896, a public meeting was held in Newcastle-upon-Tyne at which it was resolved to commemorate Her late Majesty's reign by the erection of a new infirmary for the sick and lame poor of the city and the counties of Northumberland and Durham, and the meeting elected a general committee to promote this object and requested them to prepare a scheme and issue it to the public and appeal for further subscriptions, over 38,000*l.* having

been promised at or before the meeting"; and that the committee appointed some of their number to act as an executive committee and passed the following resolution:—"That the executive committee consider what proposals should be made to the infirmary committee with a view to their joint action in matters relating to the proposed new infirmary, and submit them to the general committee as early as possible preparatory to the joint meeting of the two committees."

The executive committee took up the work, and by June 20, 1897, the day of the Diamond Jubilee, over 100,000*l.* had been promised.

The statement then continued as follows:—

"The building committee came to the conclusion that there would have to be an enlargement of the old site and accordingly applied to the corporation for more land. . . . . On August 28, 1897, it was intimated at a special court of governors that Mr. John Hall, a prominent shipowner and citizen of Newcastle-upon-Tyne, had written through his solicitors to the governors of the infirmary offering to contribute 100,000*l.* towards the building fitting and furnishing of a new infirmary on the Castle Leazes or on or near to the Recreation Ground, instead of on the site of the old infirmary, upon condition 'that the subscriptions to the new infirmary building fund become available for the general purposes of the institution.' The governors accepted Mr. Hall's offer, and resolved that the whole matter be referred to the building committee and that that committee subsequently bring up a report to the governors before applying to the corporation for a site."

The building committee resolved that the governors of the infirmary should be recommended to approach the corporation for a site for the new infirmary on the Leazes not to be less than eight acres in extent.

The recommendation was communicated to and adopted by the governors, and by November 15, 1897, the site had been selected and the corporation and the freemen had agreed to give it for the purpose.

The statement then continued as follows:—

"Mr. Hall in pursuance of his offer proceeded to make a

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codicil to his will bequeathing 100,000*l.* towards the building of a new infirmary, and stipulating that the Castle Leazes site should be procured and conveyed to the governors for the purpose of building the new infirmary, and that the governors should have received either from the subscriptions collected by the executive committee or from other sources (not being funds belonging to the governors) at least 100,000*l.* available for the general purposes of the infirmary," and stated the effect of the Newcastle-upon-Tyne Corporation (New Infirmary Site) Act, 1898. By this Act, after reciting that the infirmary had become inadequate for the reception of the patients, and that it was necessary that a more commodious infirmary should be provided, and that a number of the inhabitants of the city and of the counties of Northumberland and Durham had subscribed upwards of 100,000*l.* for the purpose of building a new infirmary, and that John Hall had offered to provide 100,000*l.* for the erection of a new infirmary upon the Castle Leazes or upon or near to the Recreation Ground, and that a suitable site for a new infirmary could be provided on the Castle Leazes, and that it was expedient that the trustees of the said infirmary should be empowered to accept Hall's offer and that for that purpose the corporation (with the consent of the stewards and wardens of the companies of the borough) should be empowered to appropriate and convey to the trustees not exceeding ten acres of the Castle Leazes as a site for such new infirmary, which site is thereinafter referred to as "the new site," and that it was expedient that the trustees should be authorized and required to surrender to the corporation the lands comprised in the lease of October 27, 1852, at the times in that Act provided, it was enacted (by s. 3, sub-s. 1) that the corporation, with the consent by resolution of the majority of the stewards and wardens, might appropriate and convey to the trustees, freed and discharged from all herbage right, a portion not exceeding ten acres in extent of the Castle Leazes as a site for a new hospital or infirmary, and that the trustees might accept and hold the same for the purpose aforesaid, and (by s. 5, sub-s. 1) that within two years after the date on which the buildings on the new site should be commenced to be used for infirmary purposes the trustees might and should surrender to the corporation

the land comprised in the said lease at the times and in the portions therein mentioned.

The surrender authorized by the Act was the surrender dated July 9, 1908, before referred to.

Neither the Act nor the surrender took any cognizance of the fact that the chapel in the old infirmary was consecrated.

Hall died in June, 1899, and the legacy of 100,000*l.* bequeathed by his codicil was paid over in March, 1901, to the governors of the infirmary, the Castle Leazes site having first been conveyed to the trustees of the infirmary by a deed dated May 17, 1900. By this deed, after reciting the title of the corporation to the new site, the subscription of the 100,000*l.*, Hall's offer to provide a like sum, the Act of 1898, and the consent of the majority of the stewards and wardens, it was witnessed that in consideration of the premises the corporation conveyed the Castle Leazes site "unto and to the use of the trustees in fee simple as a site for a new hospital or infirmary for the sick and lame poor of the city of Newcastle-upon-Tyne and of the adjoining counties of Northumberland and Durham freed and discharged from all herbage rights and rights of way and rights of user." The deed contained no express declaration of trusts, but the statement said that "trusts appear to be implied by the description of the trustees as parties, by the recital of the Act of Parliament, and by the habendum."

The statement continued as follows: "In March, 1901, Lord Armstrong, then Mr. Watson Armstrong, announced his intention of giving to the infirmary the sum of 100,000*l.*, to be used either for the building or endowment of the new infirmary as might seem to the governors to best meet existing circumstances, and to enable the work to be pushed on without delay, but he reserved the right of spreading the payment of this sum over the three following years. It was decided by the governors to apply this sum of 100,000*l.* towards the cost of the new infirmary buildings. . . . . The new infirmary buildings were opened for use in September, 1906, and soon afterwards the old infirmary premises ceased to be used by the governors for infirmary purposes, and the portion thereof comprised in the lease of October 27, 1852, was duly surrendered to the Newcastle-upon-Tyne Corporation . . . .

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The new infirmary cost more than 300,000*l.*, and the whole of the fund of upwards of 100,000*l.* subscribed by the public, Mr. Hall's legacy of 100,000*l.*, and Lord Armstrong's gift of the same amount were applied towards defraying the cost. The building committee originally appointed by the house committee on March 4, 1897, was approved by the executive committee on April 6, 1897, and, notwithstanding occasional references in minute books to the building committee being a sub-committee of the house committee, it does not appear that in practice the building committee acted as a sub-committee. It was not the practice for the minutes of the building committee to be read at the monthly meetings of the house committee, nor at the quarterly court of governors, nor did the building committee present periodical reports to the house committee or to the governors, and it was entirely independent of and out of touch with the weekly committee. The building committee, composed for the most part of members of the house committee and of the executive committee, was in close touch with both committees . . . . and acted in harmony with the views of both committees and from time to time made recommendations to the house committee which were adopted. The building committee continued to meet long after September 19, 1906 (the date of the service of consecration of the chapel), for the purpose of winding up the building accounts, and the final meeting was held on February 24, 1910. The building committee never had under consideration the question of the consecration of the chapel and never gave any sanction thereto. A part of the infirmary buildings erected on the Castle Leazes site is a chapel which adjoins and access to which is obtained from the main corridor on the ground floor level of the buildings. . . . . There is also a vestry or chaplain's room which opens out on to the back garden ground of the infirmary. The chapel is roofed and there is no building over it. There is an apartment under the chapel which is used to hold the blowing apparatus for the chapel organ and to afford access to the foundations and to various pipes laid under its floor. In the instructions and conditions of competition for plans of the new infirmary buildings which were issued to selected architects by the building committee the requirements of the committee

were set out in a schedule, and in that schedule under the head of 'General Administration' is an item 'chapel for say 120 to 150' and the next item is 'chaplain's room.' The plans sent in by the competing architects were, after they had been adjudicated upon by an assessor, exhibited to the public, and at any rate in the plan of the successful architects, if not in the plans of all the others, a small building marked 'chapel' is shown. There is no mention on the plans of the chapel being for the Church of England or that it was to be consecrated. In the specification the chapel is frequently mentioned, but there is nothing said as to what kind of a chapel it was intended to be. . . . . The fabric of the chapel cost upwards of 5000*l.* which came out of the total sum paid for the new buildings and was not specifically allocated from any one or more of the three separate sums out of which the cost was met. Gifts were made of an organ, altar, reredos, pulpit, lectern, furnishings, and windows for the new chapel by members of the Church of England."

The statement also set out extracts, referring to the chapel and chaplain's room, from the minutes of the building committee, and continued:

"It does not appear from any of the foregoing minutes that there was attached to any gift any condition that the chapel was to be consecrated or to be used solely by the Church of England, but as before mentioned these gifts were made by members of the Church of England. In the minutes of the meeting of the weekly committee on August 30, 1906, it was stated that 'the committee sanctioned the removal of the memorial tablet and memorial brass from the old chapel to the new infirmary chapel and the stained glass windows to the mortuary chapel, Dr. Hume the chaplain and the house governor to be associated with Sir G. H. Philipson in deciding upon the positions in which they shall be placed in the new chapel.' These tablets were removed from the consecrated chapel in the old infirmary without any faculty authorising the removal or any other authority except as aforesaid, and they were re-erected in the new chapel prior to the date of the consecration service."

Pages 51 et seq. of the statement of facts referred to the consecration of the new chapel as follows: "So far as can be

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ascertained the question of the consecration of the new chapel was first brought up for consideration by any committee of the infirmary at a meeting of the weekly committee held on August 23, 1906. At that meeting the matter was introduced by the chairman Sir George Hare Philipson M.D. The following is an extract from the minutes of this meeting :—'. . . . 4. Consecration of Chapel in New Infirmary. This was sanctioned and the chairman was authorised to invite the Lord Bishop of Newcastle to perform the ceremony.' In pursuance of this resolution Sir George Hare Philipson communicated with the Bishop of Newcastle-upon-Tyne, the diocese of Newcastle having been created out of the diocese of Durham in or about the year 1882. The minutes of this meeting were read at the next meeting of the weekly committee held on August 30, 1906, and confirmed and signed by the chairman Sir G. H. Philipson. The minutes of the meeting of the weekly committee held on August 30, 1906, state that 'the chairman (Sir G. H. Philipson) presented the annexed letter, which he had received from the Lord Bishop of Newcastle, consenting to consecrate the chapel of the new infirmary on Wednesday, September 19, 1906.' The minutes of the same meeting also state that 'the chairman reported that he had communicated with the bishop's secretary who is taking the necessary legal steps to have all in readiness by September 19; a block plan of the chapel including measurements of area is required and the chairman was authorised to instruct Mr. Cockrell to have this prepared.' It is clear from these minutes that the chairman of the weekly committee did, as he was authorised to do, invite the Lord Bishop to consecrate the new chapel, and that he himself communicated with Mr. Lazenby the bishop's secretary as to the legal formalities.

"On September 6, 1906, an ordinary monthly meeting of the house committee was held, the minutes of which state that 'the minutes of August 2 were read, approved, and signed by the chairman as well as weekly committee minutes.' The minutes of the weekly committee referred to include the minutes of its meetings on August 23 and 30, 1906. The minutes of the meeting of the house committee on September 6, 1906, contain no specific reference to the consecration of the new chapel, or to

the arrangements which were then going forward. The consecration of the chapel was not considered at the meeting on September 6, 1906, nor was there any motion at that meeting that the chapel be consecrated. Except for the reading and apparent approval of the said minutes the question of the consecration of the chapel does not appear to have come before the house committee until after the service of consecration on September 19, 1906. The block plan of the chapel was supplied to Mr. Lazenby in due course."

The statement then set out the form of the cards of invitation to the consecration service, which, under the directions of the chairman of the weekly committee, Mr. William Thomas Oliver, who was then the secretary of the infirmary, were printed and sent out to all the members of the house committee and some other selected persons, but not to all the governors, and also the form of the tickets of admission sent out to the persons who accepted invitations.

The statement then continued as follows: "There was no public notice given by advertisement or by posting on the door of the chapel of the intention to consecrate the chapel on September 19, 1906. By the instructions of Sir G. H. Philipson, Mr. Oliver attended upon the treasurer of the infirmary . . . . who under the statutes has the custody of the deeds of the infirmary and obtained from him the conveyance of the Castle Leazes site of May 17, 1900, and handed it to Mr. Lazenby's partner, Mr. Senhouse, in Mr. Lazenby's absence at some time prior to September 17, 1906. On September 6, 1906, Mr. Senhouse wrote to Mr. Oliver, enclosing the petition for consecration which had been prepared by Mr. Lazenby and a form of authority for endorsement of a memorandum of the consecration on the said conveyance, and for production of the conveyance to Mr. Lazenby for enrolment, which form had also been prepared by Mr. Lazenby, and requested Mr. Oliver to procure the signatures of the trustees to these documents. This Mr. Oliver did . . . . and then delivered the signed documents to Mr. Senhouse at his office."

The petition then set out a copy of the petition by the then trustees of the infirmary for consecration.

The petition recited the deed of May, 1900; that "a new hospital

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or infirmary including among other buildings a chapel has been erected on the said piece of land in substitution for the present Royal Infirmary and the consecrated chapel thereof, which is intended to be pulled down"; that "the said new chapel is erected on that part of the said piece of land which is coloured red on the plan attached to these presents and is intended to be called 'St. Luke's Chapel'"; and that it "is intended for the purpose of providing divine service according to the rubric, rites and ceremonies of the Church of England for the patients, nurses, and others attending and residing at the said infirmary, as the same has been hereto provided in the consecrated chapel of the present infirmary, and is now fitted up and completed with every requisite necessary therefor"; and it prayed that the bishop "by virtue of your ordinary and episcopal authority will be pleased to consecrate the said new chapel by the name of 'St. Luke' and dedicate the same to the service of Almighty God for the celebration of divine service therein according to the rubric, rites and ceremonies of the Church of England."

The statement then continued as follows: "It will be observed that the petition is dated September 12, 1906. It had been signed before that date but on that date it was presented to the Lord Bishop. It will also be noticed that the petitioners are not the governors, as was the case in 1754, but the trustees for the time being, and the signatories are the grantees named in the conveyance of May 17, 1900, except" two persons "who had died, and with the addition of Lord Armstrong, who had been appointed a trustee by the house committee on the recommendation of the weekly committee. There had not then nor has there since been any conveyance of the new infirmary from the surviving trustees to themselves and Lord Armstrong."

The form of authority for indorsement of the conveyance was dated September 6, 1906, and by it the trustees who had presented the petition authorized a memorandum of consecration of St. Luke's Chapel of the Royal Victoria Infirmary (the new infirmary) to be indorsed on the deed of conveyance and the production of the deed at the diocesan registry for the purpose of indorsement.

The statement then continued: "A form of service and order

of proceedings to be used at the consecration was prepared, and Mr. Oliver, acting under Sir G. H. Philipson's instructions, had it printed for use at the consecration. In the form of service, after the presentation of the petition and the bishop's assent to it, there is a direction that the bishop shall then receive from such person as shall be appointed thereunto the instruments of donation and endowment, if any, and shall place them upon the holy table. At this part of the actual service the bishop placed upon the holy table the conveyance of May 17, 1900, to the trustees of the infirmary, there not being in existence any such instrument of donation and endowment as appears to be contemplated by the order of service. Later on in the service, after the pronouncing of the consecration by the bishop, came the following direction :—'Then the bishop and the people being seated, the Chancellor (if present) or otherwise the registrar shall read aloud the sentence of consecration, which the bishop shall sign and deliver to the registrar together with the petition and the deed of conveyance to be enrolled and preserved in the registry of the diocese.' At this part of the service the registrar read the sentence of consecration, and the bishop signed it and delivered it to the registrar together with the petition and the conveyance . . . . and the registrar retained the petition and sentence of consecration, but returned the conveyance to Mr. Oliver with a letter dated September 27, 1906, after having endorsed on it a memorandum in the following terms:—'Enrolled in the Newcastle Diocesan Registry the seventeenth day of September one thousand nine hundred and six.' On the left side of the memorandum there is the impression of a rubber stamp bearing the words and figures 'Diocesan Registry 17 Sept. 1906 Newcastle.' This deed was apparently enrolled in the absence of any such instrument of donation and endowment as aforesaid."

The statement then set out a copy of the sentence of consecration, the operative part of which was as follows:—

"Now therefore we the said Bishop of Newcastle do, by virtue of our ordinary and episcopal authority (as far as by law we can), first calling on the Most High God of Heaven and Earth, Father, Son, and Holy Ghost, for a blessing upon our present purpose,

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separate set apart and convert the said newly erected chapel from all profane and common uses whatsoever. And we do dedicate the same to the service of Almighty God for the celebration of divine worship therein according to the rubric, rites and ceremonies of the Church of England. And we do declare that the same ought so to remain dedicated and consecrated for ever. And we do now declare that the said chapel shall be called by the name of 'St. Luke's Chapel,' and be a chapel for the purpose of providing divine service according to the rubric, rites and ceremonies of the Church of England, for the patients, nurses and others attending and residing at the said infirmary. And we do openly and publicly pronounce decree and declare that the said chapel shall be so assigned, separated, dedicated and consecrated for ever by this our definitive sentence and final decree, which we have caused to be read and do now promulge by these presents."

The sentence was dated September 19, 1906, the day when the service of consecration of the new chapel was held.

Mr. Lazenby's fees were paid out of the general funds of the infirmary, on the authority of the weekly committee, by a cheque dated October 4, 1906, and signed by Sir G. H. Philipson and Mr. Oliver as chairman and secretary respectively.

The statement then continued: "The printers' account for printing the invitation cards, the tickets of admission, and the form of service and order of proceedings was paid out of the like funds on the authority of a quarterly court of governors held on November 1, 1906, but it was part of an account for general printing which in accordance with the usual practice was passed as a whole without any of the details being mentioned. On September 20, 1906, there was a meeting of the weekly committee. In the minutes of this meeting there is a heading 'Consecration of Chapel September 19, 1906,' and underneath is a report of the consecration service cut out of a local newspaper. On October 4, 1906, the usual monthly meeting of the house committee was held, the minutes of which state that 'the minutes of September 6 and intervening weekly committee minutes were read and "confirmed."' There is no specific mention in the minutes of October 4, 1906, of the consecration

service. The November quarterly court of governors was held on November 1, 1906, but there is no reference in the minutes of that court to the chapel nor to the minutes of any meetings of the house or weekly committee, nor were the last-mentioned minutes read at that court, as it is not the practice to read minutes of meetings of either of those committees at quarterly courts. The whole of the steps relating to the consecration of the chapel were taken by the weekly committee and Sir George Hare Philipson, without the advice of the solicitors of the infirmary, who were not consulted."

The statement then stated the facts with reference to a deputation from the Newcastle Council of the Federation of Evangelical Free Churches asking that facilities should be given to them for holding services in the new infirmary for the benefit of such inmates as were accustomed to attend the Free Churches. The application was not to hold services in the chapel, but in a suitable room to be granted by the committee for that purpose.

The statement continued as follows: "The members of the deputation were under the impression at the interview that the chapel had been erected out of funds specially contributed or allocated to the building of a chapel to be consecrated according to the rites of the Established Church, and a statement to that effect was made on their behalf at the interview. It is not the fact that the chapel was erected out of such funds, but nevertheless neither the chairman nor any member of the committee stated the real fact that the chapel had been erected out of the general funds subscribed, and the deputation were allowed to leave the interview under the misapprehension. Shortly afterwards the true fact came to the knowledge of the members of the deputation" and certain correspondence ensued.

The statement concluded as follows: "The consecration of the chapel was not at any time ratified or confirmed by the governors. On the contrary, the service of consecration of the chapel and the way in which it had been held, without the knowledge and approval of the governors, excited very strong feelings in the minds of a majority of the governors, who held the following views namely:— (1.) That there was no implied condition or agreement binding on the governors that the new chapel was to be consecrated

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because the chapel in the old infirmary was consecrated whether legally or not. (2.) That the moneys out of which the new infirmary, including the chapel, had been built, having been subscribed by the general public, the chapel should not have been allowed to be devoted to the use and purposes of the Established Church of England solely to the exclusion of all other denominations. (3.) That the prior consent of the governors should have been procured before any petition for consecration was sent to the Bishop of Newcastle, and (4.) That the governors should not have been deprived without their consent of the full use of the chapel for all denominations. It is unnecessary for the purposes of this statement to set out in detail the course of the discussions and events that followed. . . . .

"The important event is that on February 29, 1908, the governors, under legal advice that the chapel could not lawfully be used for Free Church services, and in exercise of the power of control retained by them as the result of there having been no conveyance of the chapel site to the ecclesiastical authorities, passed a resolution by a substantial majority ordering the chapel to be closed. The order was carried into effect. The chapel was closed and has remained closed to general worship down to the present time, no services having been held therein since February 29, 1908. The service of consecration has resulted in damage to the society in two important respects: (1.) The governors have been deprived of the full and free use of part of the infirmary buildings belonging to the society and under their control, and (2.) the society has suffered in prestige with a consequential loss of charitable subscriptions and donations because of the dispute."

By their statement of defence the defendants (other than the Attorney-General) said that the chapel in the old infirmary had been validly and effectually consecrated, and, while not admitting that there was never any assurance of that chapel to any ecclesiastical authority or trustees for ecclesiastical purposes, they said that no such assurance was necessary. They also said that the fund raised by public subscription was raised for the purpose of rebuilding and enlarging the old infirmary, and that no alteration of the status of the chapel so as to make it available for any purpose other than the service of divine worship

according to the rubric, rites, and ceremonies of the Church of England was ever intended or suggested by or to the subscribers or any of them; that the chapel so consecrated for such service as aforesaid was and always had been an integral part of the charity; that the trustees, in making the request for consecration of the new chapel, acted in accordance with resolutions of the weekly committee duly approved at a meeting of the house committee; that many of the governors were aware of the arrangements made for the consecration, and that a large number of the governors did not agree with the views of the plaintiffs as regarded the matters in question in the action; and that the consecration of the new chapel was legal and effectual and could not be set aside, and that, that being so, it was not lawful to use the chapel for any purposes other than those for which it had been consecrated, and that the defendants had no power to allow any such use.

The defence of the Attorney-General was as follows: "(1.) The Attorney-General, on behalf of His Majesty, gives the Court to understand that he is not fully or sufficiently informed as to the matters stated in the statement of claim, and makes no admission as to such matters or any of them. (2.) The Attorney-General, on behalf of His Majesty, claims all such rights and interests in the subject-matter of this action as he, on behalf of His Majesty, shall appear to have therein, and submits the same to the judgment of this Honourable Court, praying that this Honourable Court will take care of His Majesty's rights and interests in the premises."

The action was tried on January 28, 1913, by Farwell L.J., sitting as an additional judge of the Chancery Division.

Romer, K.C., and *T. J. C. Tomlin*, for the plaintiffs. The consecration of the chapel was not petitioned for or authorized by the governors of the hospital, who were the only body which could apply for consecration. The consecration took place only on the invitation of the trustees, in pursuance of resolutions of the house committee; but on the construction of the statutes and rules neither the trustees nor the house committee had any authority to apply for consecration, or to devote

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the chapel to the services of the Church of England. The trustees had a bare legal estate, but no powers at all. The functions of the house committee are confined to the administration and management of the charity, and their invitation to the bishop to consecrate the chapel was ultra vires. The chapel building is held for the general purposes of the charity, including the holding of services, not only of the Church of England but of other religious denominations.

If the consecration is valid, which is open to doubt, the mere fact of consecration cannot prevent the chapel from being used for the general purposes indicated, for which it is held upon trust.

The bishop has no power to consecrate unless the donor of the land has given it for specific religious purposes. Where the trustees of a charity had conveyed the private chapel of the charity to the Commissioners under the Church Building Acts, it was held that the conveyance was a breach of trust, and a reconveyance was ordered although the chapel had been consecrated: *Attorney-General* v. *Bishop of Manchester.* (1)

No doubt it has been held that where ground has been consecrated, even in error, it must, from the ecclesiastical point of view, remain consecrated until there has been some act (if such an act is possible) performed by the ecclesiastical authority which would have the effect of annulling the consecration: *Wood* v. *Headingley-cum-Burley Burial Board* (2); *Williams* v. *Briton Ferry Burial Board.* (3) Nevertheless, the consecration cannot be allowed to interfere with the trusts on which the building is held. [They also referred to Halsbury's Laws of England, vol. xi. p. 375, and the Private Chapels Act, 1871 (34 & 35 Vict. c. 66).]

Martelli, K.C., and *Alfred Adams*, for the defendants other than the Attorney-General. The authorities clearly lay down that ground once consecrated remains consecrated until the consecration is annulled by Act of Parliament, or, possibly, by some ecclesiastical form of annulment. The governors, even if willing, could not legally allow the chapel to be used for any services except those of the Church of England. A secular Court like this has no jurisdiction to inquire into the validity of a

(1) (1867) L. R. 3 Eq. 436. (2) [1892] 1 Q. B. 713, 725.
(3) [1905] 2 K. B. 565, 571.

consecration. The argument that the consecration was not applied for by the proper authority is, however, untenable. There was in the old infirmary a chapel consecrated for the services of the Church of England, and when funds were subscribed to enlarge and rebuild the hospital, the general intention was that the new hospital buildings should include a similar chapel.

Sargant, for the Attorney-General.

Romer, *K.C.*, in reply.

Cur. adv. vult.

Feb. 5. FARWELL L.J. The parties in this case have settled an agreed statement of facts, and it is therefore unnecessary for me to state more than enough to make my judgment intelligible.

In or about 1750 a society was formed of the subscribers towards the foundation of an infirmary for the benefit of the sick and lame poor of the counties of Newcastle-upon-Tyne and Durham and Northumberland; and in 1752 a lease was granted by the mayor and burgesses of Newcastle-upon-Tyne of certain lands of the corporation to trustees for the society. The lease was for ninety-nine years, and was renewable—and was in fact renewed—and was still existing until it was surrendered as hereinafter stated; and on this land an infirmary was erected. One of the rooms in this building was appropriated as a chapel, and this chapel was consecrated by the Bishop of Durham on October 18, 1754; and services were regularly conducted thereafter in the chapel by a chaplain, who was a clergyman of the Church of England and down to 1859 was appointed by the governors of the society, receiving 10*l.* a year under an endowment of the chaplaincy made in 1758 by a pious donor.

In 1859, under a deed dated July 22, 1859, one Mrs. Tulloch settled a sum intended to produce 130*l.* a year for the endowment of a chaplain of the society, who was to be appointed by her trustees; and from 1882 to 1906 a further sum of 52*l.* 10*s.* was paid to the chaplain out of the general funds of the society probably, I gather, on account of duties performed by him in relation to all the inmates, whether Church of England or not.

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This society has a written constitution, embodied in certain statutes and rules, which have been in existence apparently from its commencement, and have been from time to time altered and amended and added to, under the powers therein contained; but the society has no trust deed, and is not incorporated or registered under any Act of Parliament. The governors consist of the donors and subscribers from time to time of sums of or exceeding a certain small amount. Such governors are now more than 1000 in number; and there are various honorary officers and four paid officials, including the chaplain. General courts of all the governors are to be held four times every year, on named days, "to receive the reports of the house committee and of the auditors, and to transact such other business as shall be brought before the court" (statute V.), and special courts can be summoned, on notice, to deal with any particular business when judged necessary by certain of the officers mentioned (statute VI.).

The treasurer and auditors are elected in February in each year by the general court, and at the same time the general court appoints a selection committee to fill up vacancies among the honorary officers (statute X.). They also appoint a committee of four to draw up the annual report (statute XXI.). None of the statutes can be altered except at a quarterly court or at a special court of the governors (statute XXIV.). It is obvious that the governors are too numerous to conduct the ordinary business of the infirmary, and accordingly house committees are appointed (statute IV.), who elect weekly committees from their number to carry on and supervise the general administration of the society, and appoint and dismiss the paid officials; they also have power to alter the rules from time to time (statute XXV.).

The most important of these rules is No. 10, which provides for weekly meetings of the house committee, at which "they shall see what former orders of the general courts, or of the house or weekly committee, remain without being carried into effect; and shall transact generally the affairs of the institution." Rule 17 deals with the chaplain, who is to perform the duties prescribed by the pious donor before mentioned, and to give two services on every Sunday and one service on every Wednesday—

the length of each service, and the proper time for conducting the same, being left to the discretion of the house committee.

The chaplain's appointment is dealt with by statute XXIII., which provides, amongst other things, that he must be a member of the Church of England. Rule 31, sub-section 4, provides that "all patients who are able to attend divine service at the infirmary chapel are invited. Those who are not members of the Church of England are not required to attend against their will, but are at liberty to have free intercourse with the ministers of their respective denominations, at hours within the general regulations of the infirmary."

In 1897, therefore, the society were in possession of an infirmary, held by them on charitable trusts for the benefit of the sick and lame poor of the three counties before mentioned—such infirmary containing a consecrated chapel, with an endowed chaplaincy attached, with statutes and rules recognizing and providing for services of the Church of England only therein; for the proviso in rule 31, sub-section 4, relates to personal intercourse, either individually or in congregations, elsewhere than in the chapel; and necessarily so, because it would be a grave ecclesiastical offence to hold or authorize any dissenting service in a consecrated chapel.

In 1897 the citizens of Newcastle-upon-Tyne were minded to commemorate Her late Majesty's long reign by building a new infirmary on the site and in lieu of the existing building, which had become insufficient for the increased requirements of the counties, and 100,000*l.* was subscribed for that purpose. Now, in my opinion, if this scheme had been carried out, it would have been necessary to preserve the existing consecrated chapel as such. There might have been practical difficulties, inasmuch as it is the particular place that is consecrated, and the room consecrated in 1754 was on the second floor.

But land once consecrated is consecrated for ever. Neither the High Court nor the Charity Commissioners, if the matter had come before them for a scheme, could possibly have treated the place that had been consecrated as anything but consecrated. But subsequent events altered this state of things. In August, 1897, Mr. John Hall, a citizen of Newcastle-upon-Tyne, offered

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the governors 100,000*l.* towards building a new infirmary on a different site, instead of on the site of the old infirmary, "on condition that the subscriptions to the new infirmary building fund become available for the general purposes of the institution"; and the governors accepted this offer, and referred the matter to a building committee appointed by them. The 100,000*l.* was in fact given by a codicil to Mr. John Hall's will, on the terms aforesaid, and on a further condition that another 100,000*l.* should be subscribed. The lease of the old infirmary was surrendered, under the provisions of an Act of 1898 obtained by the Newcastle-upon-Tyne Corporation, and this Act also enabled the corporation to sell and convey to trustees certain land "as a site for a new hospital or infirmary for the sick and lame poor of the city and of the neighbouring counties of Northumberland and Durham; and the trustees may accept and hold the same for the purposes aforesaid."

In 1901 Lord Armstrong gave 100,000*l.*, to be used either for the building or endowment of the new infirmary as might seem to the governors best to meet existing circumstances. The new infirmary was built on the new site conveyed to the trustees by the corporation, and cost more than 300,000*l.*, and the whole of the 100,000*l.* subscribed by the public and Mr. Hall's legacy and Lord Armstrong's gift were applied in discharge of this cost. The site was conveyed to the trustees in fee simple "as a site for a new hospital or infirmary for the sick and lame poor of the city of Newcastle-upon-Tyne and of the adjoining counties of Northumberland and Durham," but without any express declaration of trust. The building was carried out under the supervision of the building committee, and the new infirmary was opened for use in September, 1906.

The plans provided for a chapel, and it is plain that it was intended by all that a chapel should be erected in place of the old chapel; but the building committee never had under consideration the question of its consecration. The chapel cost about 5000*l.*, which came out of the subscribed funds generally; but the organ, altar, reredos, pulpit, lectern, furnishings, and windows were provided by special donations made by members of the Church of England.

The result of the resolutions set out on pages 51 et seq. of the statement of facts is, I think, that the house committee in August, 1906, invited the Bishop of Newcastle to consecrate the new chapel, and on September 19, 1906, the bishop consecrated it accordingly, on a petition by the trustees, which stated that the new infirmary buildings included a chapel, which had been erected "in substitution for the present Royal Infirmary and the consecrated chapel thereof, which is intended to be pulled down."

In my opinion, the act of consecration was duly performed, and the chapel has been effectively consecrated; the petition for consecration was signed by the trustees in whom the legal estate was vested, and the request to consecrate was made by or on behalf of the house committee.

The plaintiffs' case is that the trustees have a bare legal estate, with no powers at all, and that the house committee's action in inviting the bishop to consecrate was ultra vires. They contend that the house committee's functions are confined to the administration and management of the infirmary. There is great force in this argument, and, if the chapel in the pre-existing infirmary had not been consecrated, I should have agreed with it.

The effect of consecration is to withdraw the consecrated land from all secular uses and (to borrow a phrase from rating cases) to sterilize it quoad temporalia; it is certainly not within the powers of the house committee so to fetter the trust property, nor would there be any necessity for it. A chapel may be licensed so as to be appropriate for all purposes, to the same extent as if it were consecrated. The effect of consecration is not to extend its capacity for religious uses, but to limit those uses to the ceremonies of the Church of England—an inconvenience that has, I believe, caused most military and workhouse chapels to remain unconsecrated, so as to make them available for use by the ministers of all denominations. But that is not this case; the alteration of the site has, of course, removed the one insuperable difficulty in the way of an unconsecrated chapel, namely, the impossibility (without an Act of Parliament) of putting consecrated ground to secular uses.

But, in my opinion, the prima facie intention of all parties was to reproduce, as nearly as might be, the state of things existing

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in the old infirmary. I do not say that, if the matter had come before the Court on an application for a scheme, the consecration would have been a matter of course, if there had been any objection, but I do say that if there had been no opposition the scheme ought to have provided for consecrating the chapel, and, if there had been opposition, and a large number of governors had voted for and a large number against consecration, the Court would probably have solved the difficulty by directing consecration of one chapel, and the erection of another for the use of other denominations. But there was no objection to the consecration in this case before the ceremony was completed.

It is true that a short time only elapsed between the petition and the ceremony; but there is no suggestion of sharp practice here, and there was ample time for application to be made for a special court under statute VI., if it had been desired to take the opinion of the governors. The case, therefore, comes to this, that the house committee performed what was really the ministerial duty of inviting the bishop to perform the ceremony necessary to give effect to that which was presumably the intention of all parties, namely, of replacing the consecrated chapel of the old infirmary, by consecrating the chapel in the new infirmary—it was just as if the governors had resolved that the chapel should be consecrated. In that case, it would have been for the house committee, in the absence of express directions by the governors to any one else, to invite the bishop. Here the resolution was not required, because the chapel was prima facie to be consecrated, according to the intention of all the subscribers; it was, therefore, for the house committee to give the invitation to the bishop in order to carry out such intention.

But, even if this were not so, there is no jurisdiction in this Court to interfere—fieri non debet, factum valet. The judgment of consecration in this, as in all other cases, declares that the chapel "ought so to remain dedicated and consecrated for ever," and continues: "And we do openly and publicly pronounce, decree, and declare that the said chapel shall be so assigned, separated, dedicated, and consecrated for ever by this our definitive sentence and final decree, which we have caused to be read and do now promulge by these presents."

It has been decided by Dr. Lushington in *Campbell* v. *Paddington Parishioners* (1), and approved by Cockburn C.J. in *Reg.* v. *Twiss* (2), that "When ground is once consecrated," and dedicated to sacred purposes, "no judge has power to grant a faculty to sanction the use of such ground for *secular* purposes"; and the Lord Chief Justice adds that "nothing short of an Act of Parliament can divest consecrated ground of its sacred character." This proposition of Dr. Lushington is probably too broadly stated, as Sir Arthur Charles in the Arches Court of Canterbury in *In re Bideford Parish* (3), and Sir Lewis Dibdin in the same Court, in *Corke* v. *Rainger and Higgs* (4), have affirmed the jurisdiction of the Ecclesiastical Courts to grant faculties, in their discretion, for the erection of buildings and the like in consecrated ground under certain circumstances.

The general proposition is, in my opinion, correct as regards secular Courts. As Coleridge C.J. said in *Wood* v. *Headingley-cum-Burley Burial Board* (5), "While the decree or sentence remains, the ground or building in question is set apart solely for those sacred purposes"; and in *Williams* v. *Briton Ferry Burial Board* (6) the Divisional Court held that when plots A and B had been actually consecrated, they remained consecrated, notwithstanding that the sanction of the Secretary of State was required by Act of Parliament for such consecration, and had been obtained for plot A only. In *Attorney-General* v. *Bishop of Manchester* (7) the Vice-Chancellor met the argument that the Court of Chancery cannot unconsecrate a church by saying that it was a matter with which the Court had nothing to do, and refraining from extending his declaration so as to affect that question. I am, therefore, of opinion that this action fails and must be dismissed.

Solicitors for plaintiffs: *King, Wigg & Brightman, for Watson, Burton, & Corder, Newcastle-upon-Tyne.*

Solicitors for defendants (other than Attorney-General): *Pennington & Son, for Clayton & Gibson, Newcastle-upon-Tyne.*

Solicitor for Attorney-General: *Treasury Solicitor.*

(1) 2 Rob. Eccl. 558, 559.
(2) (1869) L. R. 4 Q. B. 407, 412.
(3) [1900] P. 314.
(4) [1912] P. 69.
(5) [1892] 1 Q. B. 725.
(6) [1905] 2 K. B. 565.
(7) L. R. 3 Eq. 436, 450.

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Feb. 14, 19, 20; *April* 16.

In re SIMCOE.

VOWLER-SIMCOE *v.* VOWLER.

[1912 S. 3254.]

Will—Legal Devise—Technical Words—A. and "his issue male in succession"—Words of Explanation—Intended Devolution explained—Technical Words unexplained—Rule of Construction.

Technical words of devise must be construed in their technical sense unless the context clearly shews in what other sense the testator intended to use them.

If actually used in their technical sense, they must be given their proper legal effect, however inconsistent with the testator's expressed intention as to the devolution of his estate.

A testator devised his real estate to the plaintiff, a bachelor, "and his issue male in succession, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male, and on failure of such issue" over.

This devise was followed by a name and arms clause requiring every person "entitled in possession as beneficial tenant for life or in tail under the limitations herein contained" to assume the testator's name and arms:—

Held, that the plaintiff was entitled to an estate in tail male in possession.

Jesson v. *Wright* (1820) 2 Bli. 1, 57; *Roddy* v. *Fitzgerald* (1858) 6 H. L. C. 823, 872, 877; *Van Grutten* v. *Foxwell* [1897] A. C. 658, 672, 684; and *In re Keane's Estate* [1903] 1 I. R. 215, 224, 225, applied.

Originating Summons.

By his will dated December 26, 1885, Samuel Palmer Simcoe devised his real estate as follows:—

"I devise all my real estate to my said nephew John Henry Walcot Vowler"—the plaintiff—"and his issue male in succession so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male

"And on failure of such issue To my nephew Gwillim Reginald

Vowler "—the first defendant—" and his issue male for the same estates and in the same order as my said hereditaments are hereinbefore limited to the said John Henry Walcot Vowler and his issue male

"And on failure of such issue"—similar limitations to four other nephews and their issue male—

"And on failure of such issue To my own right heirs

"Provided always that every person having a surname or arms different from the surname or arms hereinafter required to be used who shall be entitled in possession as beneficial tenant for life or in tail under the limitations herein contained shall as to every such tenant within eighteen calendar months after he shall become entitled in possession if of the age of twenty-one years or if not within eighteen calendar months after attaining that age whichever shall last happen assume and use under the sanction of an Act of Parliament a licence from the Crown or otherwise my surname of 'Simcoe' either alone or in addition to his usual surname (but so that the name of Simcoe shall be the last and principal name) also the arms of Simcoe quartered with his family arms and shall thenceforth use the same surname and arms accordingly and that every person excluded by reason of his already bearing the surname and arms aforesaid from the operation of the requisitions aforesaid shall continue the use of such surname and arms And that in case of neglect or refusal to comply with all or any of the requisitions of this proviso the estate or estates hereby limited for the life of the person or as the case may be the estate tail hereby limited to the person or ancestor of the person who shall be guilty of such neglect or refusal shall cease and the subsequent limitations be accelerated."

The testator died on January 9, 1899.

The plaintiff, who was a bachelor, duly complied with the name and arms clause.

The first defendant Gwillim Reginald Vowler had issue one son only, namely, the second defendant John Creed Gwillim Vowler, who was born on July 11, 1899, i.e., about six months after the testator's death. Of the four other nephews three had issue, and one was a bachelor.

On October 10, 1912, the plaintiff issued this summons to

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determine whether upon the true construction of the devise he was entitled to an estate in tail male, or to what other estate or interest.

The second defendant was appointed to represent the other remaindermen, and the third defendant Lydia Hannah Cole was appointed to represent the heirs-at-law of which she was one.

J. M. Gover, for the plaintiff. The legal devise in technical words to the plaintiff and his issue male in succession either gives the plaintiff a direct estate in tail male—*Roddy* v. *Fitzgerald* (1)—or a life estate with remainder to his issue male which equally gives him an estate in tail male: *Shelley's Case.* (2)

The clause beginning "so that" does not shew that the testator was using the expression "issue male" in any other than its technical sense, i.e., including all male descendants, and therefore whether it is explanatory or repugnant it cannot cut down or alter the estate in tail male given by the technical words: *Jones* v. *Morgan* (3); *Poole* v. *Poole* (4); *Doe* v. *Stenlake* (5); *Jesson* v. *Wright* (6); *Fetherston* v. *Fetherston* (7); *Roddy* v. *Fitzgerald* (8); *Jordan* v. *Adams* (9); *Forsbrook* v. *Forsbrook* (10); *Hugo* v. *Williams* (11); *Hampton* v. *Holman* (12); *Van Grutten* v. *Foxwell* (13); *In re Keane's Estate.* (14) The last case is really indistinguishable from the present case and ought to be followed.

Suppose, however, on the construction of the will the Court is of opinion that by the expression "issue male" the testator clearly meant "sons," in that case the limitation after the life estate to the plaintiff's first unborn son would be void for remoteness, and it would be necessary to apply the cyprès doctrine. The plaintiff would either take a cyprès estate in tail male, or he would take a life estate with cyprès remainders to his unborn sons successively in tail male with a remainder to

(1) 6 H. L. C. 823, 872.
(2) (1581) 1 Rep. 93b.
(3) (1783) 1 Bro. C. C. 206, 219.
(4) (1804) 3 Bos. & P. 620, 627.
(5) (1810) 12 East, 515.
(6) 2 Bli. 1, 52, 55, 57.
(7) (1835) 3 Cl. & F. 67, 73, 75; 9 Bli. N. S. 237, 273, 275.
(8) 6 H. L. C. 823, 871, 872, 875, 877, 881.
(9) (1861) 9 C. B. (N.S.) 483, 497.
(10) (1867) L. R. 3 Ch. 93.
(11) (1872) L. R. 14 Eq. 224.
(12) (1877) 5 Ch. D. 183, 191.
(13) [1897] A. C. 658, 667, 672, 684.
(14) [1903] 1 I. R. 215, 224, 225.

himself in tail male implied by the gift over: *Doe* v. *Gallini* (1); Hawkins on Wills, 2nd ed. p. 246.

Dighton Pollock, for the first defendant. I adopt the first part of the above argument and contend that the plaintiff takes an estate in tail male with remainder to my client in tail male: Jarman on Wills, 6th ed. pp. 1899, 1902; *Pierson* v. *Vickers* (2); *Reece* v. *Steel* (3); *Mortimer* v. *West* (4); *Grimson* v. *Downing.* (5)

If it is necessary to resort to the cyprès doctrine an estate in tail male should be given to the plaintiff with a similar estate in tail male to my client in remainder: Jarman on Wills, 6th ed. p. 289.

Maugham and *W. A. Greene*, for the second defendant. The language of the devise and of the name and arms clause clearly shews that the testator was not using the expression "issue male" in the technical sense, but in the sense of "sons," so that *Shelley's Case* (6) is inapplicable: Fearne on Contingent Remainders, 10th ed. vol. i. pp. 151, 196, 203, n.; *Waker* v. *Snowe* (7); *Lisle* v. *Gray* (8); *Backhouse* v. *Wells* (9); *Lowe* v. *Davies* (10); *Goodtitle* v. *Herring.* (11) The last case, which most nearly resembles the present case, was in fact affirmed in the House of Lords. (12) It was not cited in *In re Keane's Estate.* (13) It requires a less demonstrative context to turn "issue" into a word of purchase than is required in the case of "heirs of the body"—*Lees* v. *Mosley* (14); Hawkins on Wills, 2nd ed. p. 235—and the context here is sufficient.

The devise should therefore be read as a devise to the plaintiff for life with cyprès remainders to his unborn sons successively in tail male with remainder on failure of those entails to the first defendant for life with a cyprès remainder to the second defendant in tail male. There is no implied estate in tail male in remainder to the plaintiff.

(1) (1835) 3 Ad. & E. 340.
(2) (1804) 5 East, 548.
(3) (1828) 2 Sim. 233.
(4) (1828) 2 Sim. 274.
(5) (1857) 4 Drew. 125.
(6) 1 Rep. 93 b.
(7) (1620) Pal. 359.
(8) (1678) 2 Lev. 223.
(9) (1712) 1 Eq. C. Ab. 184, pl. 27.
(10) (1729) 2 Ld. Raym. 1561.
(11) (1801) 1 East, 264.
(12) (1802) 1 House of Lords Appeals (Lincoln's Inn Collection), p. 654.
(13) [1903] 1 I. R. 215.
(14) (1836) 1 Y. & C. Ex. 589, 609.

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Owen Thompson, for the heirs-at-law. I agree that "issue male" means sons, but as the devisees take by direct devise the doctrine of cyprès is inapplicable: *Mortimer* v. *West*. (1) The limitations after the life estate to the plaintiff's first unborn son are therefore void for remoteness.

J. M. Gover in reply. The cyprès doctrine applies just as much to direct devises as to executory trusts—*Hampton* v. *Holman* (2)—so that the heirs-at-law have clearly no case. The authorities cited for the second defendant are distinguishable. *Waker* v. *Snowe* (3) is explained in Fearne on Contingent Remainders, 10th ed. vol. i. p. 151. *Backhouse* v. *Wells* (4) turned on the word "only": see *Robinson* v. *Robinson*. (5) *Lisle* v. *Gray* (6), *Lowe* v. *Davies* (7), and *Goodtitle* v. *Herring* (8) are dealt with in *Fetherston* v. *Fetherston*. (9) They are merely illustrations of the dictionary principle: Hawkins on Wills, 2nd ed. p. 231. *Lees* v. *Mosley* (10) is dealt with in *Roddy* v. *Fitzgerald*. (11)

Cur. adv. vult.

April 16. SWINFEN EADY J. The question raised by this summons is what is the true construction of a devise contained in the will dated December 26, 1885, of Samuel Palmer Simcoe, deceased. The devise is in the following words:—"I devise all my real estate to my said nephew John Henry Walcot Vowler and his issue male in succession so that every elder son and his issue male may be preferred to every other younger son and his issue male and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male and on failure of such issue to my nephew Gwillim Reginald Vowler and his issue male for the same estates" and so on. This devise is followed by a name and arms clause. The testator died on January 9, 1899. The plaintiff is the testator's nephew John Henry Walcot Vowler-Simcoe, and he claims that he is tenant in tail male in possession;

(1) 2 Sim. 274, 282.
(2) 5 Ch. D. 183, 190.
(3) Pal. 359.
(4) 1 Eq. C. Ab. 184, pl. 27.
(5) (1751) 2 Ves. Sen. 225, 229, n.
(6) 2 Lev. 223.
(7) 2 Ld. Raym. 1561.
(8) 1 East, 264.
(9) 3 Cl. & F. 67, 79; 9 Bli. N. S. 237, 278.
(10) 1 Y. & C. Ex. 589, 609.
(11) 6 H. L. C. 823, 881.

or in the alternative that he is tenant in tail male in remainder expectant upon the determination of an estate in tail male devised to his first and other sons. The plaintiff has no issue. The first defendant is the testator's nephew Gwillim Reginald Vowler, and the next defendant, John Creed Gwillim Vowler, is his infant son.

If the devise had contained only the words "I devise all my real estate to my said nephew John Henry Walcot Vowler and his issue male in succession" there could have been no doubt that the devisee would have taken an estate in tail male in possession. It is now firmly established that in devises of real estate "issue" is prima facie a word of limitation and equivalent to "heirs of the body": see *Roddy* v. *Fitzgerald.* (1) In *Jesson* v. *Wright* (2) Lord Redesdale said: "The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." And in *Van Grutten* v. *Foxwell* (3) Lord Macnaghten said: "What is to be understood by 'otherwise' is shewn, I think, by the last words of the passage, in which the rule was repeated in *Roddy* v. *Fitzgerald.* (4) 'It is another and most important rule,' said Lord Wensleydale, 'in the construction of the words used in a will, that technical terms or words of known legal import should have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to shew what that sense is.'"

The question then is: Do the words which follow the devise to the plaintiff and his issue male shew that the testator did not use the technical words in their appropriate sense and also clearly shew the true sense in which he did use them? Now in the Irish case of *In re Keane's Estate* (5) the words of the devise closely resemble those in the present case. There was a devise to Henry Farrell "for the term of his natural life, and

(1) 6 H. L. C. 823, 872.
(2) 2 Bli. 1, 57.
(3) [1897] A. C. 658, 672.
(4) 6 H. L. C. 877.
(5) [1903] 1 I. R. 215, 224.

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his issue male in succession, so that every such son may take an estate for life, with remainder to his first and every subsequent son successively, according to seniority, in tail male." It was held that Henry Farrell took as tenant in tail. Ross J. said: "If the testatrix had stopped at the word 'succession,' Henry Farrell had undoubtedly an estate tail, and there would be nothing arguable in this case. But it is strongly pressed on the other side that she did not stop there. Before the ink is dry, in the same sentence, the testatrix indicates, it is said, that she means something different; she adds the explanatory clause 'so that every such son may take an estate for life with remainder to his first and every subsequent son successively according to seniority in tail male.' Here we must turn again to the cases, and the result is as follows:—'The first taker shall be held to take an estate tail when the devise to him is followed by a limitation to the heirs of his body, except where the intention has appeared so plainly to the contrary that no one could misunderstand it': *Poole* v. *Poole*. (1) If law is to remain a science at all, precision is called for. If a testator uses technical expressions, he must be presumed to use them in their technical sense except it is demonstrable that he intended to put a different sense upon them; and it is further essential that it shall appear in what sense exactly he used the expression. It is far better for the community that a testator's real intention should be occasionally defeated than that there should be increased uncertainty in the construction of instruments." Then a little later (2) the learned judge proceeded thus: "The strong point of counsel opposing the application of the rule is the expression 'so that every such son' following the expression 'issue male in succession.' This, he says, indicates that 'issue male in succession' simply means 'sons in succession.' I do not think that grammar obliges us to hold that the words 'issue male' are in meaning identical with the words 'every such son'; they might be wider in their signification. It seems to me that the clause beginning 'so that' is not to be taken as an independent clause. It is added by way of explanation of what is gone before, viz.: a devise to Henry Farrell and his issue male in succession. The

(1) 3 Bos. & P. 620, 627. (2) [1903] 1 I. R. 225.

explanatory words are not inconsistent with the prior creation of an estate tail in Henry Farrell, but indicate correctly the ordinary course of devolution of an estate in tail male in case no tenant in tail takes the necessary steps to convert it into an estate in fee."

Now the words in the present will are susceptible of the same explanation. Lord Macnaghten said in *Van Grutten* v. *Foxwell* (1), "The only touchstone one can use in trying to separate the true metal from the dross is the ruling in *Jesson* v. *Wright.* (2)" Applying this test I am satisfied that the testator by the expression "issue male in succession" meant to include the whole line of succession capable of inheriting, the whole line of heirs male of the plaintiff's body, and the legal result is to give him an estate in tail male. This construction is aided by the words introductory to the next devise in remainder "and on failure of such issue."

In *Van Grutten* v. *Foxwell* (3) Lord Davey said: "In my opinion the rule in *Shelley's Case* (4) is a rule of law and not a mere rule of construction—i.e., one laid down for the purpose of giving effect to the testator's expressed or presumed intention. The rule is this: that wherever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death, in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs, or heirs male of the body, or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary. Wherever, therefore, the Court comes to the conclusion that the gift over includes the whole line of heirs, general or special, the rule at once applies, and an estate of inheritance is executed in the ancestor or tenant for life, even though the testator has expressly declared that the ancestor shall take for life and no longer, or has endeavoured to graft upon the words of gift to the heirs, or heirs of the body, additions, conditions, or limitations which

(1) [1897] A. C. 673.
(2) 2 Bli. 1, 57.
(3) [1897] A. C. 684.
(4) 1 Rep. 93b.

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are repugnant to an estate of inheritance, and such as the law cannot give effect to. The rule, I repeat, is not one of construction, and, indeed, usually overrides and defeats the expressed intention of the testator; but the question always remains, whether the language of the gift after the life estate properly construed is such as to embrace the whole line of heirs or heirs of the body or issue, and that question must be determined apart from the rule, according to the ordinary principles of construction, including those which I have already referred to." Now applying this test the words "issue male in succession" are equivalent to "heirs male of the body" and embrace the whole inheritable issue taking in a course of descent.

I therefore answer the summons by determining that on the death of the testator the plaintiff became, and now is, entitled to an estate in tail male in possession.

It was contended that, if the plaintiff did not take an immediate estate tail, but took for life only, with remainder to his first and other sons in tail male, he also took an estate tail in remainder expectant on the determination of the estate tail limited to his first and other sons, but in the view which I take of the true construction of the devise in question this point does not arise.

Solicitors: *Busk, Mellor & Norris, for Peter & Son, Launceston; Peacock & Goddard, for Whidborne & Cole, Dawlish.*

G. R. A.

In re GORDON AND ADAMS' CONTRACT.

In re PRITCHARD'S SETTLED ESTATE.

EVE J.
1913
April 4, 17.

[1913 G. 269.]

Settlement — Settled Land—Power of Appointment—Title—Sale—Compound Settlement—Trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 5, 8; *s.* 38.

By his will the testator appointed trustees, and empowered his wife, by deed or will, to appoint and dispose of all or any part of his property, and in default he gave all his freehold estates to his wife for life, with remainder to the use of W. P. G. for life, with remainders over. The trustees had a power to sell any part of the freehold estates. The testator died in 1891, and by her will his widow appointed W. P. G. her sole executor, and in exercise of her power of appointment appointed the real estate devised by her husband's will to the use of W. P. G. for life, with remainder to the use of his first and every other son successively in tail male, with remainders over. The widow having died, W. P. G., as tenant for life in possession, contracted to sell part of the settled estate. Upon an objection being taken by the purchaser that the vendor could not make a good title until trustees of the compound settlement for the purposes of the Settled Land Acts were appointed:—

Held, that the limitations contained in the widow's will must be read into the will which created the power; and inasmuch as there were still trustees of the first will for the purposes of the Settled Land Acts, a good title could be made without any further appointment of trustees.

ADJOURNED SUMMONS.

This was an originating summons taken out by William Pritchard Gordon, of Stanmore Hall, Bridgnorth, in the county of Salop, as tenant for life in possession of certain settled estates under two wills, asking for a declaration that the trustees of the settlement were trustees for the purposes of the Settled Land Acts, and that he had shewn a good title to part of the settled real estate which he had contracted to sell. The facts are taken from the judgment of the Court.

By his will dated June 15, 1891, John Pritchard appointed the Reverend William Henry Wayne and John Arthur Austin (afterwards Sir John Arthur Austin, K.C.B.) trustees thereof, and empowered his wife, Jane Pritchard, by deed, will, or codicil, at any

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time, or times, to appoint, dispose of, give, devise, or bequeath, in such manner and whether for her own benefit or otherwise as she might think fit, all or any part of his property of what nature or kind soever, and in default of and until any such disposition, gift, devise, or bequest thereof, and so far as any such should not extend, the testator gave all his freehold estates to the use of his wife and her assigns for her life, with remainder to the use of William Pritchard Gordon and his assigns for his life, with divers remainders over, and the testator empowered the trustees and trustee of his will to sell any part or parts of his freehold estates thereinbefore given.

The testator died on August 19, 1891, and by her will, dated December 5, 1891, his widow appointed the said William Pritchard Gordon her sole executor, and in exercise of the aforesaid power of appointment appointed the real estate devised by the will of her husband to the use of the said William Pritchard Gordon and his assigns for life, without impeachment of waste, with remainder to the use of his first and every other son successively according to seniority in tail male, with remainders over.

The testatrix died on February 25, 1892, and on July 2, 1912, William Pritchard Gordon, in exercise of his powers as tenant for life in possession, contracted with John Adams for the sale to him of part of the settled estates.

On investigating the title the purchaser raised the objection that there were no trustees for the purposes of the Settled Land Acts of the compound settlement created by the two wills, and he insisted that the vendor could not make a title until such trustees were appointed. To this the vendor replied that as there was a continuing power of sale in the trustees of John Pritchard's will, they were trustees for the purposes of the Acts, and no further appointment was necessary.

G. B. Rashleigh, for the vendor. This is not really a question of a compound settlement. The vendor is tenant for life under the will of the testator John Pritchard, who created the power of appointment. The terms of the second will by his widow exercising the power of appointment must be read into the first

will. There are cases where trustees of a compound settlement are necessary where the estate has come home and a resettlement is made, or in cases where the original tenant for life is dead and the tenant for life under a subsequent settlement desires to sell free of charges and jointure. But here the original estate for life under the old settlement endures, and the tenant for life can sell notwithstanding the existence of the subsequent settlement. The person exercising the power has no estate, that all comes from the original settlement. The estate which the purchaser gets is the estate of the original testator. There is also a continuing power of sale in the trustees of John Pritchard's will, and they are, therefore, trustees for the purposes of the Settled Land Acts: Sugden on Powers, 8th ed. p. 470; *In re Earl of Devon's Settled Estates.* (1) The doctrine that the appointee takes under the original deed is followed in all its consequences. In the present case the estate never came home, and the cases where resettlements of family estates took place are inapplicable.

Lyttelton Chubb, for the purchaser. The proposed sale is under the Settled Land Act, 1882, s. 2, sub-ss. 1, 5, 8, and trustees are required for the purposes of that Act. The two wills together must be deemed to form one compound settlement. The case comes within the decisions of *In re Marquis of Ailesbury and Lord Iveagh* (2) and *In re Mundy and Roper's Contract.* (3) In the present case it is not possible to make the settlement one deed by reading the document exercising the power into the document which gave the power. It is the two documents together which create the settlement. The vendor was never in fact tenant for life under the first will. He cannot convey to a purchaser without having trustees appointed of the settlement created by these two wills.

G. B. Rashleigh in reply. In the cases referred to the estate had come home. It would be a new decision to hold that trustees for the purposes of the Settled Land Acts are necessary in a case like the present.

Cur. adv. vult.

(1) [1896] 2 Ch. 562, 567. (2) [1893] 2 Ch. 345.
(3) [1899] 1 Ch. 275.

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April 17. EVE J., after stating the facts as above set out, continued: In my opinion the contention of the vendor is right. Although, no doubt, both wills must be looked at for the purpose of ascertaining the limitations of the settled estate and must therefore be treated as comprising one compound settlement, the position is essentially different from those cases where there has been a resettlement of the family estates in that the estate of the appointee is derived under the will of John Pritchard, and the limitations contained in the widow's will must be read into the will which created the power. This doctrine—that the appointee takes under the original instrument—is followed in all its consequences (see Sugden on Powers, 8th ed. p. 470, and per Chitty J. in *In re Earl of Devon's Settled Estates* (1)), and in this case where there are still trustees for the purposes of the Acts of John Pritchard's will, I think the application of the doctrine results in this, that a good title can be made without any further appointment of trustees, and I so declare. The purchaser must pay the vendor's costs of the summons.

Solicitors: *Church, Adams & Prior, for Nicholls & Taylor, Bridgnorth; A. B. Chubb & Pettitt, for W. J. Pitt, Bridgnorth.*

(1) [1896] 2 Ch. 562, 567.

G. M.

C. A.
1913
April 10, 11.

In re FINLAY.
C. S. WILSON & CO. *v.* FINLAY.

[1911 F. 1415.]

Principal and Agent—Stockbroker—Open Account—Death of Client before Settling Day—Duty of Broker—Reduction of Amount of Client's Indemnity—Closing Account—Taking over of Client's Shares by Broker at a Valuation—Liability of Broker to account.

Where there is an open account between a broker and his client, the broker is entitled, on the death of the client, to close the account at once and to sell all shares in respect of which he has entered into contracts on behalf of the client. Although the broker cannot properly sell the shares to himself, yet, when the circumstances are such that an immediate sale upon the market would be detrimental to the interests of the client's estate, the broker may, if he pleases, take over the shares at a valuation based on the market prices of the day, provided that by so doing the estate of the client is not prejudiced.

Decision of Warrington J., ante, p. 247, affirmed.

Walter & Gould v. *King* (1897) 13 Times L. R. 270; *Macoun* v. *Erskine, Oxenford & Co.* [1901] 2 K. B. 493; and *Erskine, Oxenford & Co.* v. *Sachs* [1901] 2 K. B. 504, followed.

Ellis v. *Pond* [1898] 1 Q. B. 426, distinguished.

Appeal from a decision of Warrington J. (1)

Maurice Trent Finlay by his will, dated October 8, 1892, appointed his widow, the defendant, Clarissa Rose Finlay, sole executrix thereof. During the year 1911 the testator was engaged in extensive speculations in rubber and other shares, and had a large number of accounts open with the plaintiffs, C. S. Wilson & Co., who were brokers of Mincing Lane, but not members of the Stock Exchange, and with other brokers. The plaintiffs had made large purchases of shares on the instructions and for the account of the testator. The great bulk of the shares so purchased by the plaintiffs had been carried over for the testator from settling day to settling day. A small number had been taken up by and in the name of the plaintiffs as, there being no "takers," they were unable to carry them over. The plaintiffs were the registered holders and held the certificates of these shares.

On October 11, 1911, the next account day being October 27,

(1) Ante, p. 247.

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the testator called upon the plaintiffs and stated that his affairs were in a very involved condition and requested them to realize all the shares which they were carrying over for him, as well as those for which they held certificates, as speedily as possible.

The testator was found drowned in the Serpentine on the morning of October 25, 1911, and on the same day the plaintiffs had the shares then remaining unsold valued by a member of the Stock Exchange and closed the testator's account by themselves taking over the shares at that valuation. They accordingly credited the testator's account with the amount of the valuation less the ordinary brokerage as on a sale, and claimed to be paid the balance thus shewn to be due to them.

On October 31, 1911, the plaintiffs, on behalf of themselves and all other creditors of the testator, commenced an action against the defendant for the administration of his estate, and on November 28, 1911, the usual creditors' administration judgment was pronounced.

In the action the plaintiffs carried in a claim for 1522*l.* 4*s.*, but the Master disallowed the sum of 74*l.* 11*s.* 3*d.* claimed by them for commission, thereby reducing the claim to 1447*l.* 12*s.* 9*d.*, which sum the Master by his certificate found to be due to the plaintiffs. Thereupon the defendant took out a summons to discharge or vary the certificate by disallowing the debt of 1447*l.* 12*s.* 9*d.* Warrington J. dismissed the summons, and from that decision the defendant appealed.

W. S. Schwabe and *G. T. Simonds*, for the appellant. Warrington J. has held that upon the death of the client a broker is entitled to take over his shares as on a sale to himself. That cannot be supported.

[COZENS-HARDY M.R. referred to *Scrimgeour's Claim.* (1)]

There was no valid transaction of sale here and the defendant is entitled to an account of any profits made by the plaintiffs. The claim of the plaintiffs is based upon their right to indemnity in respect of the contract entered into by them on behalf of the testator, but in the circumstances of this case they are not entitled to any such indemnity.

(1) (1873) L. R. 8 Ch. 921.

The plaintiffs being agents have dealt with their principal's property and must account for any profits they have made. They could not properly sell to themselves. *Walter & Gould* v. *King* (1), *Macoun* v. *Erskine, Oxenford & Co.* (2), and *Erskine, Oxenford & Co.* v. *Sachs* (3), upon which Warrington J. relied, do not apply to this case. Here there was no sale at all. In *Ellis* v. *Pond* (4) a broker who bought stock for his client for the next settling day, and before that day, without his principal's authority, sold at a loss, was held to have no right to indemnity. That case is in point. What took place on October 25 cannot be regarded as a sale at all. The transaction should be set aside and an account taken: *Langton* v. *Waite.* (5)

H. Terrell, K.C., and *W. Copping*, for the respondents, were not called upon.

COZENS-HARDY M.R. We will not trouble you, Mr. Terrell.

I am so entirely satisfied with the judgment of Warrington J. that I almost hesitate to say a word about it. It seems to me that he accurately appreciated the legal position, and that there is nothing in any part of his judgment which I should desire to qualify or to dissent from.

The claimants here were brokers. They were not members of the Stock Exchange; but they were brokers. They had large dealings with the testator in this cause, the result of which was that at the end of October there was a very large sum due to them, partly in respect of contracts which had been entered into for the purchase of shares which had been carried over from account to account, and to a small extent for shares which had been actually taken up by and were vested in the name of the brokers.

The testator was found drowned in the Serpentine on the morning of October 25, two days before the account day. What were the brokers to do? They were entitled to indemnity in respect of the contracts which they had, by the authority and on behalf of the testator, entered into on his behalf. He had, a few

(1) 13 Times L. R. 270.
(2) [1901] 2 K. B. 493.
(3) [1901] 2 K. B. 504.
(4) [1898] 1 Q. B. 426.
(5) (1868) L. R. 6 Eq. 165.

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days before this, knowing himself to be in difficulties, instructed the brokers to close his account. They had sold some of the shares before the 25th; but, those unsold being rubber shares, the market for which was in a very critical condition, it was not reasonably possible, in a business sense, and it was certainly not expedient, to attempt to throw all this large block of rubber shares on the market at once. What did they do? They communicated at once with a gentleman who was the solicitor of the executrix and also the solicitor of the brokers. They then found that they could not, at the moment, close the account in a strictly legal and proper sense, namely, by selling these shares on the market, or selling, rather, to be more strictly accurate, the benefit of the contracts to purchase on the market. But they did that which, upon the evidence, the learned judge finds (and I entirely agree with him) was the reasonable and expedient course to take in order to minimize the loss which the testator had incurred. They ascertained, by a means which the learned judge thinks was reasonable, and which I certainly think was reasonable, namely, by consulting an independent person, a member of the Stock Exchange, what was the value of the shares, and they went through the form of selling the shares to themselves. That, of course, was a perfectly idle and mischievous form. Nothing that I say must ever be construed into lending colour to the idea that a broker in such circumstances can sell the shares to himself. The learned judge has taken exactly the same view. It has not been treated as a sale: the brokers have not been allowed the commission on the sale, or the expenses of the sale; but the amount for which credit has been given is that which was the best that could be got under the circumstances, namely, the true value of the shares on that day, and, that being so, it seems to me that it is not really open to us to take any other view than that which was taken by Warrington J.

The case of *Macoun* v. *Erskine, Oxenford & Co.* (1), which I will not go through again, binds us, if I had any doubt upon the matter at all; and *Scrimgeour's Claim* (2) shews that this doctrine is not limited to a broker who is subject to the rules of the Stock Exchange, because, although there was evidence

(1) [1901] 2 K. B. 493. (2) L. R. 8 Ch. 921.

there of the custom of the Stock Exchange, both James L.J. and Mellish L.J. treated the question on a wider ground than that. They treated it upon the ground that the broker, under those circumstances, was entitled to protect himself by closing the contracts which he had entered into on behalf of his principal. The legitimate course, and the only legitimate course, if the circumstances admit it, is a sale to somebody else. If the broker does not take that course, the burden is upon him to shew that the shares which he has not sold, because he could not sell them, were taken at that which was a reasonable and fair price. The evidence is absolutely conclusive that that was the case here. There is no suggestion here of a profit having been made by the brokers. On the contrary, a very heavy loss has been made.

I think the judgment of Warrington J. is perfectly right, and that this appeal must be dismissed with costs.

BUCKLEY L.J. When, on the morning of October 25, Mr. Finlay was found drowned, the claimants were acting for him in connection with a speculative account in a large number of rubber shares, and were responsible in respect of certain shares which had been taken up. The account day was the 27th, two days later. The widow was sister of one of the members of the claimants' firm. Under those circumstances, the most natural course possible was taken, they being brother and sister. Everything indicates that the brother was in these unfortunate circumstances desirous to assist his sister to get out of the difficulty. The same solicitor as was solicitor of the firm was instructed to act also on behalf of the widow. The parties took counsel's opinion and received certain advice, and, as the result of that advice, the following transaction was entered into. The brother took upon himself all the obligations and responsibilities of the speculative account. This was carried out by what was called a sale by the brokers to themselves. A few days before, Mr. Finlay had instructed his brokers to close the account. That authority, no doubt, was determined by his death. The brokers certainly were not, in law, entitled to sell to themselves, but they did so. The result, therefore, was this—that by a transaction

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which certainly was generous, kindly, and well-intentioned on the part of the brokers, they put themselves into the dead man's shoes for the purpose of relieving his estate from further responsibility. But they did it in a way which, no doubt, could not be supported in law. An agent may not sell to himself.

Under these circumstances, the brokers brought in a claim in the administration action which had been instituted. The only question on this summons is, For what can they prove? It appears to me that they may prove for either one of two things, as the executrix prefers. The executrix may say, if she pleases, "I repudiate this sale altogether; it does not bind me in law. I am prepared to pay the money which, as between myself and you, as the agents, I owe you, and I will take up the contracts for the shares; I will relieve you of them and I will pay you." That would be giving effect to the indemnity to which the brokers are entitled. If that were done, the claim which the broker would bring in would not be a small sum, a couple of hundred pounds or something like that, but would be many thousands of pounds. Or the executrix may say, if she pleases, "I will not complain of the sale, and now I shall only owe you the difference between the sum which I should have owed you and the sum which, having regard to that transaction, is to be set off, namely, the purchase price as between you and me." In this proceeding it is not possible to work out the respective legal rights by way of indemnity. Mr. Schwabe truly says that he has not had discovery or anything of that kind. He could bring his action to set aside the sale and to redeem. He is not prepared to do anything of that kind. Under those circumstances, what is the sum for which the brokers can properly claim? They must now claim on the footing that the executrix affirms the sale. She says "I want to have credit for some sum. I quarrel with you as to what is the sum for which I shall have credit. I affirm the purchase; but I quarrel with the amount which you say is the right amount." There is no evidence whatever to shew that the purchase-money was not the proper and fair purchase-money. The brokers took the best steps they could to ascertain what, as between brother and sister, was the fair price of the shares. Under those circumstances, it

appears to me that the judgment of the learned judge covers the whole of this case. Of course it is absolutely clear, in point of law, that an agent cannot sell to himself; but it is also plain that the claimants are, under the circumstances of this case, only claiming that which is due to them. The appeal must be dismissed with costs.

KENNEDY L.J. I agree, and entirely for the same reasons.

Solicitors: *St. Barbe Sladen & Wing; Woodhouse & Davidson.*

G. A. S.

LEWIS *v.* MEREDITH.

[1912 L. 2049.]

Water—Artificial Watercourse—Mill Stream—Riparian Proprietors—Common Owner—Easement—Presumption from User—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6—*General Words.*

An artificial watercourse, constructed long before living memory, carried water from a weir in the river Arran at Dolgelly to a mill owned by the defendant lower down the river. The plaintiff owned land adjoining the watercourse between the intake and the mill. For more than 100 years prior to 1908 the lands of the plaintiff and defendant belonged to a common owner, but the tenants had always been different. In 1908 the plaintiff's land and the mill were conveyed to the predecessors in title of the plaintiff and defendant respectively; the conveyance to the plaintiff's predecessor was silent as to any water rights; the conveyance to the defendant's predecessor contained a grant of the flow of water as used and enjoyed. There was evidence that the tenants of the plaintiff and his predecessors had always used the water from the watercourse for the purposes of their respective businesses of a fellmonger and a mason's yard, but the tenants of the mill had always kept it in repair, had stopped the water altogether when necessary for repairs, and to some extent controlled the flow of water. The defendant had taken up the troughs which formed the original watercourse and substituted iron pipes from which the plaintiff's tenants could get no water. There was a dispute whether the plaintiff's land included the site of the watercourse:—

Held, on the facts, that the land upon which the watercourse opposite the plaintiff's land was constructed was comprised in the conveyance to the plaintiff, and that the true inference from the user of water was

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that the watercourse was originally constructed for the common benefit of all the tenants, and that the quasi-easements enjoyed by the plaintiff's tenants during the common ownership had passed to the plaintiff by virtue of the general words in s. 6 of the Conveyancing Act, 1881; and that therefore the defendant's removal of the old troughs and substituting the iron pipes was a trespass, and an inquiry as to damages must be directed.

THIS action was brought by the owner in fee simple of a piece of land situate in Meyrick Street, Dolgelly, in Merionethshire, bounded on the south-east by the river Arran. Part of the north-east portion of the plaintiff's premises comprised two tan pits and was occupied by a tenant of the plaintiff's for his business of a fellmonger, and a further part of such portion was occupied by another tenant of the plaintiff's for the purposes of his business of a stonemason. Until shortly before this action was commenced there was upon the south-east portion of the plaintiff's premises a line of open wooden troughs which had been constructed on the surface of the plaintiff's land nearly parallel to and about two feet from the edge of the bank of the said river, and carried water flowing in a northerly direction across the plaintiff's premises from an intake on the river immediately above a weir adjoining the plaintiff's premises. The troughs were about two feet wide and ten inches deep, and their bottom was about four feet above the usual water level of the river opposite the plaintiff's property. The defendant was the owner of a piece of land with a mill thereon lower down the river. The tenants of the mill had always used the water from the line of troughs to turn the mill wheel and for other purposes. Shortly before this action was commenced the defendant entered upon the site of the line of troughs, took them up, and substituted therefor a line of iron pipes from which the plaintiff's tenants could not obtain any water. The plaintiff brought this action for a mandatory injunction directing the defendant to remove the iron pipes and restore the troughs and an injunction restraining him from committing any trespass upon the plaintiff's property. The defendant alleged that the line of troughs was constructed by the common owner of the plaintiff's and defendant's premises, or by the occupier of the mill, for the sole and exclusive purpose of supplying water to the mill; and that it was

in fact an artificial watercourse of a temporary nature which existed only for the purpose aforesaid. He also alleged that during the whole time that the troughs were standing they were in the absolute control of the occupier for the time being of the said mill, who kept the troughs in repair and had power to, and from time to time did, regulate the flow of the water or stop it altogether; and that the user, if any, by the plaintiff's tenants was precarious and by permission of the occupier of the mill.

It was admitted at the hearing that for a period of many years before 1908—it was suggested from 1779 but the exact date was not proved—the plaintiff's and defendant's premises and the land where the intake was were in the same ownership, but always, so far as the evidence went, in the occupation of different tenants. Between the plaintiff's premises and the defendant's mill the line of troughs passed over land belonging to different owners. The land was put up to sale in December, 1907, when the plaintiff's premises were sold to him and the defendant's premises were sold to his predecessor in title respectively. The conveyance to the plaintiff was dated August 12, 1908, and contained no express reference to any water rights. The conveyance to the defendant's predecessor was dated August 14, 1908, and conveyed "the messuage or dwelling-house known as Felin Isaf with the old mill now used as a workshop, and the waterwheel fittings and fixtures together with the full right and benefit of passage and running of water to the said mill and premises as now and heretofore used and enjoyed therewith."

The defendant denied that the land between the plaintiff's premises and the river Arran, over which part of the line of troughs ran, was comprised in the conveyance to the plaintiff, but on the first day of the hearing the judge decided that it was so comprised.

There was some conflict of evidence, but the facts as to the watercourse and the user of the water as found by the judge were as follows. Water had from a time long before the witnesses' memory flowed down the line of troughs from the intake in the river to the mill, and after that had not been returned to the Arran, but made its way by an independent course to the river Wnion, into which the Arran fell.

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The intake was through earthernware pipes fifteen inches in diameter which pierced the weir and led the water into a trough, originally made of slates upon the ground, for which was afterwards substituted a wooden trough raised for some part of its course above the mill upon uprights or legs. At one point below the plaintiff's premises, after passing through a cistern, it was culverted beneath the ground for some distance, and at the date of the action it ran underground for the whole distance from the cistern to the mill. For a very long period the occupiers of the fellmonger's yard on the plaintiff's land used the water by means of a plugged hole in the trough 1½ to two inches in diameter. When the water was required the plug was removed and a wooden lander or trough was placed underneath to catch the water and lead it to the tan pits. After use the water was not returned to the watercourse, but found its way into the river Arran opposite the tan pits. The tenants from time to time of the stonemason's yard also took what water they required for their business by means of buckets from the trough. The water after use ran away to the Arran and was not returned to the watercourse.

During the whole period the line of troughs was kept in repair and cleaned by the tenants of the mill, and on several occasions the whole line was renewed. On each of these occasions, except one, the hole by the fellmonger's yard, which enabled the tenant thereof to use the water, was restored by the tenants of the mill; and on that one occasion it was omitted, but afterwards, on the request of the tenant of the fellmonger's yard, its restoration was permitted by the tenant of the mill.

When necessary for the purpose of cleaning or repairing, the tenant of the mill stopped the intake at the weir, thus sending the water over the weir and down the river. On some occasions at the request of one Pugh, who worked a sawmill lower down the river, the tenant of the mill stopped the water at the intake to give Pugh more water. But the judge held that this was only done late at night or early in the morning when it did not inconvenience the persons using the water, and that it was not done in the exercise of any legal right.

There was also evidence that at times when he was short of water the tenant of the mill requested the persons above him not

to use any water, but the judge held that this was merely requested, not insisted on as a right.

Peterson, K.C., and *Bischoff*, for the plaintiff. As the channel in this case was artificial the persons holding land at each side of it would not have any rights as riparian owners strictly speaking. But the facts of user may be such as to lead the Court to the conclusion that the line of troughs was originally constructed by all the owners, or the mill owner was allowed to construct it by the other owners, on condition that the owners on each side should have the rights of riparian owners or even more extensive rights. *Whitmores* (*Edenbridge*), *Ld.* v. *Stanford* (1) and *Baily & Co.* v. *Clark, Son & Morland* (2) establish that proposition. The evidence in this case shews sufficient user to support such an inference. *Burrows* v. *Lang* (3) is distinguishable because in that case the whole of the watercourse was on the defendant's land and the plaintiff's claim could not be supported unless the mill owner was bound to keep the watercourse supplied with water though he did not want it himself. The Court held that a right to take the water whenever it happened to be there was unknown to the law and could not be claimed.

The mere fact that the tenant of the mill in this case to a certain extent controlled the flow of the water does not prove that the watercourse was constructed solely for the purposes of the mill.

The fact that the conveyance to the plaintiff does not mention any right of water is unimportant, for by virtue of s. 6 of the Conveyancing Act, 1881, all rights of way and water pass, even such as have been only enjoyed by permission: *International Tea Stores Co.* v. *Hobbs.* (4)

There was no express reservation in the plaintiff's conveyance of the mill race, and none could be implied: *Russell* v. *Watts.* (5)

Jenkins, K.C., and *P. F. Wheeler*, for the defendant. The evidence on behalf of the plaintiff really sets up a right to take all the water the plaintiff desires without limit or regard to the defendant's rights. That is much wider than the right of

(1) [1909] 1 Ch. 427.
(2) [1902] 1 Ch. 649.
(3) [1901] 2 Ch. 502.
(4) [1903] 2 Ch. 165.
(5) (1883) 25 Ch. D. 559; (1885) 10 App. Cas. 590.

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riparian proprietors and is a right unknown to the law. If the plans are closely examined they shew that the land granted to the plaintiff could not have extended to the river.

[NEVILLE J. I think that the fellmonger's yard must be taken to have extended to the river, and therefore the line of troughs was on the plaintiff's land.]

The conveyances to the plaintiff's and defendant's predecessors in title must be taken to have been contemporary. Both must be read as including the general words supplied by the Conveyancing Act, 1881, but the defendant does not need those words, for his conveyance has express words. The true inference from the facts is that at the date of the conveyances in 1908 the tenant of the mill had absolute control of the water-course and the tenants above him could only take subject to his rights. He had and exercised a right to stop the water altogether, and if that were so no one else could acquire any rights against him: *Burrows* v. *Lang*. (1)

Farwell J., as he then was, comments on that case in *International Tea Stores Co.* v. *Hobbs* (2) and shews that any right which passes under the general words of the Conveyancing Act, 1881, must be a right known to the law. A right to take water if it happens to be there is not a right known to the law. A man cannot get a prescriptive right to take water out of a channel the existence of which depends on another. Nor can an obligation be implied against the man who has control of the channel to supply water: *Wood* v. *Waud* (3); *Hanna* v. *Pollock* (4); *Arkwright* v. *Gell*. (5)

The general words implied by the Conveyancing Act, 1881, can only pass what was in existence, and the only thing in existence was a quasi-right to take water whenever it was there.

The cases cited by the plaintiff's counsel only shew that you can infer from user that it was agreed that the owners of the land beside an artificial stream should have the rights of riparian owners.

Peterson, K.C., in reply. The plaintiff does not claim a right

(1) [1901] 2 Ch. 502.
(2) [1903] 2 Ch. 165.
(3) (1849) 3 Ex. 748, 779.
(4) [1900] 2 I. R. 664, 670.
(5) (1839) 5 M. & W. 203.

to take all the water; the line of troughs was constructed for the benefit of all the owners, and the user must be consistent with the interests of all. The miller had the right to repair and to stop the water for that purpose only. That was for the common benefit and could not be objected to.

[NEVILLE J. Is there any reported case of an easement arising out of an easement?]

I should not put it in that way. I should contend that the easement was granted to the miller subject to the conditions and restrictions in favour of the other owners. But in Gale on Easements, 8th ed. p. 11, it is stated that an easement may be appurtenant to an incorporeal hereditament, and he cites Bracton and Co. Litt. 121 B, note 7 (Hargrave and Butler's edition), *Hanbury* v. *Jenkins* (1), and *Attorney-General* v. *Copeland*. (2)

Jenkins, K.C., referred to Laws of England, vol. xi. pp. 238 (note d), 242.

Cur. adv. vult.

March 18. NEVILLE J. The rights of the plaintiff and defendant in this action depend in my judgment upon the grants contained in the conveyances of August 12 and 14, 1908, which must, under the circumstances, be treated as contemporaneous grants. The grant to the plaintiff is silent as to the watercourse, but, as I have held, granted the land over which it runs at the place in question. In the grant to the predecessors in title of the defendant it is referred to as follows: "with full right and benefit of passage and running of water to the said mill and premises as now and heretofore used and enjoyed therewith." There is no reservation in either case to the grantors, so that the watercourse is vested in the plaintiff at the place in question subject to the easement granted. How then was the passage and running of water to the mill used and enjoyed at and before the date of the grant? Was it as against the occupiers of the plaintiff's land the use of all the water flowing over it through the troughs, or was the enjoyment subject to any and what user by those occupiers?

(1) [1901] 2 Ch. 401, 421, 422.
(2) [1901] 2 K. B. 101; [1902] 1 K. B. 690.

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So far back as the memory of the witnesses reaches this watercourse has run from above the weir on the river Arran, skirting the river for some distance and then going slightly inland, until it reached a mill wheel, and from below the wheel has found its way into the river Wnion lower down. The intake was through earthernware pipes fifteen inches in diameter which pierced the weir and led the water into troughs originally made of slates upon the ground, for which subsequently was substituted a wooden trough raised upon uprights or legs, for some part, at all events, of its course above the mill. At one point, after passing through a cistern, it was culverted beneath the ground for some distance towards the mill and now runs beneath the street for the whole distance from the cistern to the mill. There is considerable evidence of user of the water as it flowed down the open trough by the occupiers of the lands through which its course ran, but so far as we know the occupants of the plaintiff's land and the mill have always until after 1908 been tenants of the same landlord. Throughout a long period of years the occupants of a fellmonger's yard, part of the plaintiff's land, have used the water from the trough for the purposes of their tan pit, taking the water from the trough by means of a plugged hole. When the water was required the plug was removed and a wooden lander or trough placed underneath to catch the water and lead it to the tan pit. After use it was not returned to the watercourse, but found its way into the Arran opposite, or nearly opposite, to the tan pit. The plaintiff's land also comprised a stonemason's yard in respect of which such water as was required was taken by buckets from the trough. The water after use ran away to the river Arran and was not returned to the watercourse. Throughout the period covered by the evidence the trough appears to have been kept in repair by the tenants of the mill. On several occasions the entire line of troughs was renewed. When this was done the hole enabling the use of the water for the fellmonger's yard was restored by the mill owners until the last occasion when the hole was omitted. On this occasion upon the request of the occupant of the fellmonger's yard the tenants of the mill assented to the insertion of the hole. The hole was $1\frac{1}{2}$ inches to two inches in diameter. It appeared that

for the purposes of cleansing and repair the tenants of the mill stopped up the intake, thus sending the water over the weir and down the river whenever necessary, and there was evidence that occasionally at the request of one Pugh, who worked a saw-mill at a weir lower down the river than the weir already mentioned, the tenant of the mill lent him the water—that is to say, stopped up the intake so that the volume of the water flowing down to Pugh's wheel was increased by the amount of the water which would otherwise have flowed down the watercourse. The evidence, I think, shews that this was done either in the early morning before working hours or after 6 in the evening when working hours were over. I am not satisfied that in fact it was ever done at any other time, and there is no evidence that any of the persons using the water higher up the watercourse were ever inconvenienced. I do not think that in lending the water to Pugh the tenant of the mill was exercising any legal right which he possessed. Sometimes when the water was low the occupants of the fellmonger's yard were requested not to use the water on account of the insufficiency of water at the mill. There is a conflict of testimony as to whether this request was peremptory and founded upon a legal demand or whether it was an appeal to neighbourly feeling. In my judgment it was not insisted upon as a right.

I come to the conclusion that at the date of the grant the water was being and had for a long time been used for the tan pit and the mason's yard. Easement or right in the strict sense there could not be, for the common ownership precluded the acquisition of any right or easement by the occupiers, but *International Tea Stores Co.* v. *Hobbs* (1) shews that "a right" permissive at the date of the grant may become a legal right upon the grant by force of the general words in s. 6 of the Conveyancing Act, 1881. From this point of view the circumstances under which the quasi right was enjoyed become immaterial so long as it was actually enjoyed and was of a nature which could be granted, that is to say, a right known to the law: see *Burrows* v. *Lang*. (2)

In my judgment the diversion of the stream at the intake was

(1) [1903] 2 Ch. 165. (2) [1901] 2 Ch. 502.

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not for a temporary purpose, although the water was used for a mill wheel, because I think the evidence precludes the inference that the watercourse was solely for the purpose of the mill. This distinguishes the case from the decision of Farwell J. last mentioned. The mill owner had, I think, a right to repair the troughs and to enter upon the land of the plaintiff for that purpose, but there was no evidence of any need for repair, and even had there been I think that the action of the defendant in removing the trough and substituting closed iron pipes exceeded any right which the existence of his easement could give him and was a trespass upon the plaintiff's land. In my opinion his right was limited to the repair of the troughs when necessary, and the plaintiff, through his tenants, was entitled to use the water as it flowed through the troughs over his land to the extent to which it had been used at and previous to the date of the grant to him.

I must grant an injunction restraining the defendant from trespassing upon the plaintiff's land and from interfering with the troughs thereon except for the purposes of repair. I cannot grant the mandatory injunction asked for, but I will, if the plaintiff requires it, direct an inquiry as to damages. The defendant must pay the costs of action to-day, and I will reserve the costs of the inquiry. The wiser course would appear to be for the defendant to undertake to remove the pipes and restore the troughs and so render the inquiry as to damages unnecessary, but this I must leave to the consideration of the parties.

Solicitors: *Huntley & Son, for Wm. Griffith, Adams & Williams, Dolgelly; Gibson & Weldon, for R. Guthrie Jones, Dolgelly.*

J. R. B.

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SARGANT J.

1913

March 5.

[1910 M. 2758.]

Practice—Order declaring Priorities and for Foreclosure or Sale by Court of Appeal—Appeal to House of Lords—Enlargement of Time for Redemption—Application to Court of First Instance—Rules of the Supreme Court, 1883, *Order* LXIV., *r.* 7.

An order of the Court of Appeal reversed in favour of the plaintiff the order of the Court below on a question of priorities, and went on to make a complete decree for an account and for redemption on payment by the defendants within a fixed time, and in default of payment for sale by the plaintiff out of Court and application of the proceeds of sale in payment of the amount due to him and costs. The defendants, who intended to appeal to the House of Lords, applied in the Court of first instance for an extension of the time fixed for redemption:—

Held, that the application was properly made to the Court of first instance and not to the Court of Appeal.

Hamill v. *Lilley* (1887) 19 Q. B. D. 83, and *The Khedive* (1879) 5 P. D. 1, distinguished.

ADJOURNED SUMMONS.

In this action the plaintiff claimed to be entitled to a first charge on the Lower Brow Farm at Haworth, in the county of York, as against three defendants, John Farrer, Louisa Whiteley, and Walter Durrance. Parker J. dismissed the action with costs. (1) The plaintiff appealed, and on March 18, 1912, the Court of Appeal (Cozens-Hardy M.R. and Buckley L.J., dissentiente Fletcher Moulton L.J.) (2) discharged the order of Parker J. and declared the plaintiff to be entitled to a first charge on the property, and ordered an account to be taken of what was due to the plaintiff for principal, interest, and costs, distinguishing the costs incurred down to and after the date of the order, and ordered that, upon the defendants or any of them paying to the plaintiff what should be certified to be due to him within two months after the date of the Master's certificate, the plaintiff should reconvey the property; and in default of such payment that the property should be sold, and that the plaintiff be at liberty to sell the same out of Court, and that the moneys

(1) *Manks* v. *Whiteley* [1911] 2 Ch. 448.

(2) *Manks* v. *Whiteley* [1912] 1 Ch. 735.

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to arise by such sale should be paid into Court and be applied so far as they would extend in the following payments to the plaintiff: (1.) in payment of what should be found due to him other than his costs, (2.) in payment of the plaintiff's costs incurred after the date of the order, and (3.) in payment of the plaintiff's costs down to the date of the order; and it was ordered that the defendants John Farrer and Louisa Whiteley should pay to the plaintiff any balance of his costs down to the date of the order which the moneys so paid into Court should be insufficient to pay; and the order expressly reserved liberty to apply to any of the parties.

Some delay occurred owing to the death of the plaintiff in August, 1912, and the substitution of his executors, who were now carrying on the proceedings. The Master made his certificate dated December 20, 1912, so that the time fixed for redemption by the order of the Court of Appeal expired on February 20, 1913. On January 28 the defendant John Farrer took out the present summons asking for an order that, the defendants John Farrer and Louisa Whiteley undertaking to present an appeal to the House of Lords within fourteen days, the time for redeeming the property might be enlarged until the twentieth day of the month next succeeding the month in which the judgment of the House of Lords should be given. Parker J. felt some doubt about the jurisdiction, and at the request of the plaintiffs the summons was adjourned into Court.

The question was whether the judge in the Court below had jurisdiction to make the order, or whether the application ought not to be made to the Court of Appeal.

T. J. C. Tomlin, for the summons. There was no delay on the part of the defendants such as to disentitle them from seeking to extend the time. As regards the question of jurisdiction the extension of time is properly applied for in the Court of first instance. The Court of Appeal made the order which the judge in the Court below would have made if he had taken a correct view of the law, and the result is the same as if Parker J. had himself made an order in the same terms as the order of the Court of Appeal. If the objection is a sound one it must follow

that after the case has once come before the Court of Appeal all subsequent applications which may be necessary for working out such an order in chambers must be made to the Court of Appeal, which is an impossible contention.

H. A. Hind, for the respondents. If the order asked for is made by this Court the effect will be to stay execution under an order of the Court of Appeal, and it is settled practice that an application for a stay of execution under an order of the Court of Appeal pending an appeal to the House of Lords should be made to the Court of Appeal alone: *Hamill* v. *Lilley* (1); *The Khedive*. (2) In the present case the time is not a mere matter of detail since it fixes the plaintiff's right to sell the property out of Court. In any case the defendants have shewn no special grounds for the stay, which having regard to the terms of the order will delay payment of the plaintiff's costs, as well as of his principal and interest.

T. J. C. Tomlin in reply. The cases cited were cases of a stay of execution in the strict sense. The order in question is an order of a totally different character from the orders in those cases. The defendants are not asking for any stay of proceedings in the present case so far as the account is concerned, but only for relief in respect of the regulation of proceedings under the order. Such applications were never intended to be made to the Court of Appeal. Suppose, for instance, that the Court of Appeal in the course of an appeal made an order for delivery of pleadings in an action and named a time within which they were to be delivered, could it be seriously contended that an application for extension of the time must be made in the Court of Appeal? Order LXIV., r. 7 (3), enables the Court to extend the time fixed by the rules themselves as well as by any order of the Court.

(1) 19 Q. B. D. 83.

(2) 5 P. D. 1.

(3) Order LXIV., r. 7, provides: "A Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

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SARGANT J. This is a curious application and one upon which I have felt considerable difficulty. By an order of the Court of Appeal it was declared that the plaintiff was entitled to a first charge on certain property; an account was directed to be taken of what was due on the mortgage, and on the defendants paying to the plaintiff what should be certified to be due within two months of the Master's certificate the property was to be reconveyed. In default of payment a sale was directed; and, the Court being satisfied that all parties interested were before it, the plaintiff was given liberty to sell out of Court and subject to a reserve. Delay occurred due largely to the death of the plaintiff and the necessity for the reconstitution of the proceedings. The Master has taken the account and made his certificate on December 20, 1912. The consequence was that under the strict terms of the order of the Court of Appeal the property would have been liable to be sold by the plaintiff on February 20 last. Shortly before that date a summons was taken out by the defendant Farrer, a competing mortgagee who had been postponed to the plaintiff by the decision of the Court of Appeal, asking that the sale might be delayed pending an appeal to the House of Lords, and the matter came before Parker J. in chambers. The matter was considered by him and certain alterations were made in the form of the order; but as he was not quite satisfied on the question of jurisdiction, at the request of the plaintiffs the summons was adjourned into Court for the determination of that question.

With regard to the question of delay I do not think there has been any such delay as to disentitle the defendants to the relief asked for, though if the order be made it ought to be made upon terms which I will presently consider.

The real question is whether sitting in this Court I can in effect qualify or extend in respect of time the order made by the Court of Appeal on March 18, 1912. As regards the King's Bench and Admiralty Divisions two express decisions have been brought to my notice establishing that the Court of Appeal is the proper tribunal to apply to for obtaining a stay of execution pending an appeal to the House of Lords. There is no question about the matter in simple cases in those two Divisions, as

where the Court has made an order for the transfer of shares or for the payment of damages to be certified by the registrar. But orders in the Chancery Division are very different from orders made in the other Divisions and often involve the working out of many details. To take an instance which Mr. Tomlin gave in the course of his argument, and which seems to apply to all Divisions, suppose (in the course of an appeal on some substantial question) an order to be made by the Court of Appeal directing pleadings to be delivered within a certain time, I should have thought it was perfectly plain that if it was desired to apply for an extension of time the application ought to be made to the Court of first instance and that Order LXIV., r. 7, applied. [His Lordship read the rule and continued:] That rule actually gives the Court power to enlarge the times fixed by the rules having the force of an Act of Parliament; and I think that in a case where the time is not really an essential part of the order of the Court of Appeal, but is merely fixed for the purpose of the working out of a complicated order, it would be absurd and would lead to the choking of the Court of Appeal with small applications, if it were necessary to apply to the Court of Appeal for any extension of the time. There is no doubt a difficulty in saying where the line shall be drawn, for I feel the force of Mr. Hind's contention that from certain points of view this is not a matter of detail at all, but is of importance as regards the time fixed for the sale of the property, since the order of the Court of Appeal has actually fixed the time for sale, though that is dependent on working out the accounts. But in my opinion, in the circumstances of this case, all the Court of Appeal really did was to determine the question of principle and to give relief founded upon that footing, and not to decide how long a time should be given in every conceivable event before the order for sale should become effective. Therefore, though I have arrived at this conclusion with some hesitation, I consider that I am entitled to modify the order of the Court of Appeal by enlarging the time mentioned in the order, and I will do so as provided in the draft order. The next point is as to the terms to be imposed on the defendants, and, although I do not think that there has been much actual delay in the prosecution of the application, I think

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that the plaintiff is to some extent prejudiced in being kept out of his money, though, if he had attempted to sell the property pending an appeal to the House of Lords which had been registered as a lis pendens, I feel great doubt if any purchaser would have been safe in accepting the title. He is, however, entitled to something in consideration of his being kept out of his money, and I will make it an additional term of the order that the defendants bring 100*l.* into Court within one month.

Solicitors: *Williamson, Hill & Co., for Walshaw & Son, Halifax; Burn & Berridge, for G. H. Manks, Elland.*

A. C.

END OF VOL. I.

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In the Second Series,
[1913] 1 K. B. [1913] 2 K. B. [1913] 3 K. B. [1913] P.

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BUILDING SOCIETY—*Winding-up — Pensions —Proofs—Voluntary Allowance—Ultra vires.*

A building society, in addition to the usual business of a building society, carried on banking and other businesses. All these businesses were housed in one building and were managed by the same board of directors and were served by the same staff. The society was ordered to be wound up in 1911, and the banking business was held to be ultra vires the society.

In 1903 A., a correspondence clerk of the society, retired at the request of the board and was promised a pension; and in 1906 B., a clerk in the banking business, retired at the request of the board and was promised a pension. Both pensions were duly paid until the winding-up order, and A. and B. claimed to prove in the winding-up for the capital value of their respective pensions:—

Held, that A.'s pension was merely a voluntary allowance not founded on any contract, and therefore his claim failed.

Held, also, that B., apart from any question of contract, being employed in the banking business which was ultra vires, could not prove against the assets of the society. *In re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY
Neville J. 400

BUILDINGS — *Urban Authority — Building Owner—Deposited Plans passed—Length of New Street defined on Plans—New Street constructed —Cul-de-sac—Houses built—By-laws—Paignton Improvement Act*, 1898 (61 & 62 *Vict. c. cclvii.*), *ss.* 46, 48, 50—*Building Owner's Right to enclose Dead End of Cul-de-sac—Alleged Highway—Dedication—Evidence—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 157—*Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 17.

In 1907 the plans of a building estate deposited by the owner were passed by the local authority. The plans shewed an intended new street with a southern outlet into a highway and extending northwards therefrom some distance without an outlet, so that it was a cul-de-sac. The plans also shewed the land on the east side of the new street plotted out for the erection of houses. The new street was constructed, kerbed and channelled on its eastern side with a footpath, at the cost of the owner and to the satisfaction of the local authority, who, as the water authority, laid a water main in the new street. A gas main was also laid therein. By 1910 the owner had disposed of all the plots except the two northernmost plots, and had granted to his purchasers or lessees a right of way over the new street, and houses were built. In September, 1910, K. bought the two remaining plots and the north end of the new street so far as it was coterminous with the two plots, with a right of way over the new street up to the two plots, and erected a fence with an opening for gates across the new street in a line with the southern boundary of the two plots, thus enclosing the north end of the new street he had bought. The local authority had not taken over the street or expended any public money upon it, but alleged that the new street throughout its entire length had been dedicated to the public and had become by user a highway, and threatened to pull down and remove the fence. In an action by K. to restrain the local authority from interfering with or pulling down his fence:—

Held, on the evidence, that the new street had not by dedication or user become a highway, but was a private road.

Held, also, that the by-laws and special Act of the local authority dealt only with the width and level, and not with the length, of new streets, and therefore that, in the absence of an order under s. 17 of the Public Health Acts Amendment Act, 1907, the owner was entitled to

BUILDINGS—*continued.*

deviate from the plans and to enclose the north or dead end of his private road.

An injunction was granted accordingly. KIRBY *v.* PAIGNTON URBAN DISTRICT COUNCIL **Neville J. 337**

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—— *Alabaster* v. *Harness* [1895] 1 Q. B. 339, 341, 344.
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—— *Askew* v. *Woodhead* (1880) 14 Ch. D. 27
Applied. *In re* SIMPSON; CLARKE *v.* SIMPSON – – **[1913] 1 Ch. 277**

—— *Barker, In re* (1881) 17 Ch. D. 241, 243
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—— *Baskett* v. *Lodge* – (1856) 23 Beav. 138
Distinguished. *In re* BEAUMONT; BRADSHAW *v.* PACKER
[1913] 1 Ch. 325

—— *Bayley's Settlement, In re* (1870) L. R. 9 Eq. 491; (1871) 6 Ch. 590.
Considered. *In re* WISE'S SETTLEMENT; SMITH *v.* WALLER
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—— *Baylis* v. *London (Bishop of)* [1912] 2 Ch. 318.
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—— *Bideford Parish, In re* [1900] P. 314
Approved in preference to *Campbell* v. *Paddington Parishioners* (1852) 2 Rob. Eccl. 558. SUTTON *v.* BOWDEN
[1913] 1 Ch. 518

—— *Bisgood* v. *Henderson's Transvaal Estates, Ld.* [1908] 1 Ch. 743.
Applied. ETHERIDGE *v.* CENTRAL URUGUAY NORTHERN EXTENSION RAILWAY COMPANY, LIMITED
[1913] 1 Ch. 425

—— *Bouch* v. *Sproule* (1887) 12 App. Cas. 385
The principle of, applied. *In re* EVANS; JONES *v.* EVANS – **[1913] 1 Ch. 23**

—— *Bristol (Marquis of), In re* [1897] 1 Ch. 946.
Followed. *In re* MARKE WOOD; WODEHOUSE *v.* WOOD
[1913] 1 Ch. 303

—— *Cadman* v. *Cadman* (1886) 33 Ch. D. 397
Followed. *In re* BADGER; BADGER *v.* BADGER – **[1913] 1 Ch. 385**

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—— *Campbell* v. *Paddington Parishioners* (1852) 2 Rob. Eccl. 558.
In re Bideford Parish [1900] P. 314, and *Corke* v. *Rainger and Higgs* [1912] P. 690, approved in preference to. SUTTON *v.* BOWDEN – **[1913] 1 Ch. 518**

—— *Cavendish, In re* – [1912] 1 Ch. 794
Followed. *In re* MARKE WOOD; WODEHOUSE *v.* WOOD
[1913] 1 Ch. 303

—— *Collyer* v. *Isaacs* (1881) 19 Ch. D. 342, 351
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—— *Cooper* v. *Macdonald* (1873) L. R. 16 Eq. 258.
Distinguished. *In re* BEAUMONT; BRADSHAW *v.* PACKER
[1913] 1 Ch. 325

—— *Corke* v. *Rainger and Higgs* [1912] P. 69
Approved in preference to *Campbell* v. *Paddington Parishioners* (1852) 2 Rob. Eccl. 558. SUTTON *v.* BOWDEN
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—— *Croyden, In re* – (1911) 55 Sol. J. 632
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—— *D'Angibau, In re* (1880) 15 Ch. D. 228, 242
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—— *Denman (J. L.) & Co., Ld.* v. *Westminster Corporation* [1906] 1 Ch. 464, 478.
Statement of Buckley J. in, adopted and followed. DAVIES *v.* CITY OF LONDON CORPORATION
[1913] 1 Ch. 415

—— *Deutsche National Bank* v. *Paul* [1898] 1 Ch. 283.
Followed. HUGHES *v.* OXENHAM
[1913] 1 Ch. 254

—— *Dixon, In re* – – – [1902] 1 Ch. 248
Overruled. *In re* AVERY; PINSENT *v.* AVERY – – – **[1913] 1 Ch. 208**

—— *Dungannon (Lord)* v. *Smith* (1846) 12 Cl. & F. 546.
Referred to. *In re* FANE; FANE *v.* FANE – – – – **[1913] 1 Ch. 404**

—— *Ellis* v. *Pond* – – [1898] 1 Q. B. 426
Distinguished. *In re* FINLAY; C. S. WILSON & CO. *v.* FINLAY
[1913] 1 Ch. 565

—— *Erskine, Oxenford & Co.* v. *Sachs* [1901] 2 K. B. 504.
Followed. *In re* FINLAY; C. S. WILSON & CO. *v.* FINLAY
[1913] 1 Ch. 565

—— *Finlay, In re; C. S. Wilson & Co.* v. *Finlay* [1913] 1 Ch. 247.
Affirmed. – – **[1913] 1 Ch. 565**

—— *Fitzroy* v. *Cave* – [1905] 2 K. B. 364
Followed. DEFRIES *v.* MILNE
[1913] 1 Ch. 98

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—— *Foster* v. *Foster* – (1875) 1 Ch. D. 588
Applied. HOPKINSON *v.* RICHARDSON
[1913] 1 Ch. 284

—— *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1906) 22 Times L. R. 274, 275.
Applied. ORAM *v.* HUTT
[1913] 1 Ch. 259

—— *Hamill* v. *Lilley* (1887) 19 Q. B. D. 83
Distinguished. MANKS *v.* WHITELEY
[1913] 1 Ch. 581

—— *Hindle* v. *Taylor* (1855) 5 D. M. & G. 577
Distinguished. *In re* BEAUMONT; BRADSHAW *v.* PACKER
[1913] 1 Ch. 325

—— *Hughes* v. *Oxenham* [1913] 1 Ch. 181
Reversed – – **[1913] 1 Ch. 254**

—— *Hulse* v. *Hulse* (1871) L. R. 2 P. & M. 259
Followed. SINCLAIR *v.* FELL
[1913] 1 Ch. 155

—— *Hyatt, In re* – (1888) 38 Ch. D. 609
The principle stated in, has not been altered by s. 8 of the Trustee Act, 1888.
In re BLOW; GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL *v.* CAMBDEN
[1913] 1 Ch. 358

—— *Jesson* v. *Wright* – – (1820) 2 Bli. 1, 57
Applied. *In re* SIMCOE; VOWLER-SIMCOE *v.* VOWLER – **[1913] 1 Ch. 552**

—— *Keane's Estate, In re* [1903] 1 I. R. 215, 224, 225.
Applied. *In re* SIMCOE; VOWLER-SIMCOE *v.* VOWLER – **[1913] 1 Ch. 552**

—— "*Khedive*," *The* – – (1879) 5 P. D. 1
Distinguished. MANKS *v.* WHITELEY
[1913] 1 Ch. 581

—— *Kolchmann* v. *Meurice* [1903] 1 K. B. 534
Followed. HUGHES *v.* OXENHAM
[1913] 1 Ch. 254

—— *Lacons* v. *Warmoll* [1907] 2 K. B. 350, 364.
Dictum of Fletcher Moulton L.J. in, dissented from. *In re* BLOW; GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL *v.* CAMBDEN
[1913] 1 Ch. 358

—— *Lea* (*R. J.*), *Limited* (*In re an Application of*), *for Registration of a Trade Mark* [1912] 2 Ch. 32.
Affirmed – – **[1913] 1 Ch. 446**

—— *M'Mahon* v. *Gaussen* – [1896] 1 I. R. 143
Approved and followed. *In re* HODGSON; WESTON *v.* HODGSON
[1913] 1 Ch. 34

—— *Macoun* v. *Erskine, Oxenford & Co.* [1901] 2 K. B. 493.
Followed. *In re* FINLAY; C. S. WILSON & CO. *v.* FINLAY – **[1913] 1 Ch. 565**

—— *Manks* v. *Whiteley* [1911] 2 Ch. 448; C. A. [1912] 1 Ch. 735.
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[1913] 1 Ch. 581

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—— *Mundy's Settled Estates, In re* [1891] 1 Ch. 399.
Adopted and applied. *In re* HANBURY'S SETTLED ESTATES – **[1913] 1 Ch. 50**

—— *Norman* v. *Villars* – (1877) 2 Ex. D. 359
Followed. SINCLAIR *v.* FELL
[1913] 1 Ch. 155

—— *Palace Hotel, Ld., In re* [1912] 2 Ch. 438
Not followed. *In re* DOECHAM GLOVES, LIMITED – **[1913] 1 Ch. 226**

—— *Pearson's Trusts, In re* (1872) 20 W. R. 522; 26 L. T. 393.
Discussed but not followed. SINCLAIR *v.* FELL – – – **[1913] 1 Ch. 155**

—— *Perkins, In re* – – (1893) 67 L. T. 743
Discussed. *In re* MARKE WOOD; WODEHOUSE *v.* WOOD
[1913] 1 Ch. 303

—— *Plumptre's Marriage Settlement, In re* [1910] 1 Ch. 609, 616.
Distinguished. PULLAN *v.* KOE
[1913] 1 Ch. 9

—— *Reg.* v. *Wimbledon Local Board* (1882) 8 Q. B. D. 459, 462, 464, 465.
Followed. SHAW *v.* TATI CONCESSIONS, LIMITED – **[1913] 1 Ch. 292**

—— *Roddy* v. *Fitzgerald* (1858) 6 H. L. C. 823, 872, 877.
Applied. *In re* SIMCOE; VOWLER-SIMCOE *v.* VOWLER – **[1913] 1 Ch. 552**

—— *Ruthin and Cerrig-y-Druidion Railway Act, In re* (1886) 32 Ch. D. 438.
Followed. *In re* WEST YORKSHIRE TRAMWAYS ACT, 1906 **[1913] 1 Ch. 170**

—— *Sartoris' Estate, In re* – [1892] 1 Ch. 11
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—— *Shafto* v. *Bolckow, Vaughan & Co.* (1887) 34 Ch. D. 725, 728.
Applied. THORNHILL *v.* WEEKS
[1913] 1 Ch. 438

—— *Smith* v. *Lucas* (1881) 18 Ch. D. 531, 543
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—— *Solomon, In re*; *Nore* v. *Meyer* [1912] 1 Ch. 261.
Compromised – **[1913] 1 Ch. 200**

—— *Spickernell* v. *Hotham* (1854) Kay, 669, 675
Distinguished. PULLAN *v.* KOE
[1913] 1 Ch. 9

—— *Taylor, Ex parte* (1820) 1 Jac. & W. 483 (Public Library Register of Dissenters' Births).
Applied. *In re* WOODWARD; KENWAY *v.* KIDD – – **[1913] 1 Ch. 392**

—— *Thatcher's Trusts, In re* (1884) 26 Ch. D. 426
Followed. *In re* COOPER; COOPER *v.* COOPER – – – **[1913] 1 Ch. 350**

—— *Trenchard, In re, Trenchard* v. *Trenchard* [1902] 1 Ch. 378.
Followed. *In re* SIMPSON; CLARKE *v.* SIMPSON – – **[1913] 1 Ch. 277**

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—— *Trenchard, In re; Ward* v. *Trenchard* (1900) 16 Times L. R. 525.
Not followed. *In re* SIMPSON; CLARKE *v.* SIMPSON – – [1913] 1 Ch. 277

—— *Trew* v. *Perpetual Trustee Co.* [1895] A. C. 264.
Distinguished. *In re* BEAUMONT; BRADSHAW *v.* PACKER [1913] 1 Ch. 325

—— *Union Bank of Kingston-upon-Hull, In re* (1880) 13 Ch. D. 808, 810.
Dictum of Jessel M.R. in, followed. *In re* DEMERARA RUBBER COMPANY, LIMITED – – [1913] 1 Ch. 331

—— *United Land Co.* v. *Great Eastern Ry. Co.* (1875) L. R. 10 Ch. 586.
Followed. WHITE *v.* GRAND HOTEL, EASTBOURNE, LIMITED [1913] 1 Ch. 113

—— *Van Grutten* v. *Foxwell* [1897] A. C. 658, 672, 684.
Applied. *In re* SIMCOE; VOWLER-SIMCOE *v.* VOWLER – [1913] 1 Ch. 552

—— *Vic Mill, Limited, In re* [1913] 1 Ch. 183
Affirmed – – – [1913] 1 Ch. 465

—— *Victoria Steamboats, Ld., In re* [1897] 1 Ch. 158.
Distinguished. *In re* NEW YORK TAXICAB COMPANY; SEQUIN *v.* THE COMPANY – – - [1913] 1 Ch. 1

—— *Wallace* v. *Greenwood* (1880) 16 Ch. D. 362, 365, 366.
Dicta of Jessel M.R. in, not followed. HOPKINSON *v.* RICHARDSON [1913] 1 Ch. 284

—— *Walter* v. *Selfe* (1851) 4 De G. & Sm. 315
Referred to. ADAMS *v.* URSELL [1913] 1 Ch. 269

—— *Walter & Gould* v. *King* (1897) 13 Times L. R. 270.
Followed. *In re* FINLAY; C. S. WILSON & CO. *v.* FINLAY [1913] 1 Ch. 565

—— *Watkins, In re; Maybery* v. *Lightfoot* [1912] 2 Ch. 430.
Affirmed – – – [1913] 1 Ch. 376

—— *Whitham* v. *Kershaw* (1885) 16 Q. B. D. 613, 616.
Dictum of Lord Esher M.R. in, dissented from. DEFRIES *v.* MILNE [1913] 1 Ch. 98

—— *Whittuck* v. *Waters* (1830) 4 C. & P. 375 (Wesleyan Chapel Register of Burials).
Applied. *In re* WOODWARD; KENWAY *v.* KIDD – – – [1913] 1 Ch. 392

—— *Windham* v. *Graham* (1826) 1 Russ. 331
Followed. *In re* WISE'S SETTLEMENT; SMITH *v.* WALLER – [1913] 1 Ch. 41

—— *Wise, In re* [1896] 1 Ch. 281; 73 L. T. 743
Explained. *In re* COOPER; COOPER *v.* COOPER – – – [1913] 1 Ch. 350

CHANCERY DIVISION—Practice—Action tried in Chancery Division with witnesses—Form of order — Appeal — Schedule of evidence – – – – – – **492**
See PRACTICE. 1.

CHAPEL — Charity — Hospital — Consecrated chapel — Rebuilding — New chapel — Effect of consecration – – – **518**
See CHARITY 2.

CHARITY—*Cy-près—Gift for a School—Failure of Particular Object.*

A testator gave all his property to his three daughters and their children, his will continuing as follows: "But if all die without issue" — which event happened—"I give and bequeath the whole principal of their fortunes, the interest to be given to a schoolmaster as a part of his salary The school and his house to be erected by voluntary subscriptions from the landowners and proprietors of the parish of A., and the school and house to be placed on a hill near to the gate that divided B. and W. Commons . . . . The master to teach five days in a week and six hours each day, Saturday and Sunday excepted, to be able to instruct the pupils in Latin and Greek and all the elementary parts of mathematics, both pure and mixed, the W. scholars to go free, the rest to pay 2*s.* 6*d.* each at Midsummer and Christmas as quarter pence." There was evidence that there was no reasonable chance of any such school being established at or in the neighbourhood of the place where the testator directed it to be built:—

Held (subject to the Attorney-General intimating within a limited time his desire for an inquiry whether and how far it would be possible to carry out the directions in the will), that the gift fell within the class of cases where on the true construction of the will no paramount general charitable intention could be inferred, but the gift was for a particular purpose; and that, as it was impossible to carry out that purpose, the gift failed altogether.

In re WILSON. TWENTYMAN *v.* SIMPSON **Parker J. 314**

2. ——*Hospital— Consecrated Chapel — Rebuilding—New Chapel—Effect of Consecration*

Land once consecrated is consecrated for ever or at any rate until an Act of Parliament divests it of its sacred character; and no secular Court has power to grant a faculty for the use of it for secular purposes, although the Ecclesiastical Courts have jurisdiction to grant faculties, in their discretion, for the erection of buildings and the like in consecrated ground in certain circumstances.

In re Bideford Parish [1900] P. 314, and *Corke* v. *Rainger and Higgs* [1912] P. 69, approved in preference to *Campbell* v. *Paddington Parishioners* (1852) 2 Rob. Eccl. 558.

About 1750 a society (which had no trust deed and was not incorporated) was formed of the subscribers towards the foundation of an infirmary for the benefit of the sick and lame poor of certain counties, and in 1752 a lease of land was granted to trustees for the society for a term of years subsequently renewed until 1951.

CHARITY—*continued.*

On this land an infirmary was erected, and one of the rooms in the building was appropriated as a chapel and was consecrated by the bishop of the diocese in 1754. From 1754 Church of England services were regularly conducted in the chapel by a chaplain who was a clergyman of that Church and down to 1859 was appointed by the governors of the society, receiving 10*l.* a year under an endowment of the chaplaincy. In 1859 a lady settled a yearly stipend on the chaplain, who was to be appointed by her trustees, and from 1882 to 1906 a further but smaller annual sum was paid to him out of the society's general funds.

In 1897 (when the society had a written constitution embodied in statutes and rules which recognized and provided for services of the Church of England only in the chapel) the citizens of N., in which the infirmary was situate, subscribed 100,000*l.* to commemorate the Diamond Jubilee of Queen Victoria by building a new infirmary on the site and in lieu of the existing building. But a citizen of N. offered 100,000*l.* to the governors towards building a new infirmary on a site different from that of the old infirmary on condition that the subscriptions to the new infirmary building fund became available for the general purposes of the institution and that another 100,000*l.* should be subscribed. This offer was accepted, the lease of the old infirmary was surrendered under authority of an Act of Parliament which also enabled the corporation of N. to give a new site for the proposed infirmary, and, in 1901, another donor gave 100,000*l.* to be used for the building or endowment of the new infirmary as might seem best to the governors. The new site was conveyed to trustees as a site for the new infirmary, but without any express declaration of trust, and on this site, under the supervision of a building committee appointed by the governors, the new infirmary was built at a cost which absorbed the two sums given by the two individual donors. The plans provided for a chapel the cost of building which came out of the subscribed funds generally, but the organ, altar, reredos, pulpit, lectern, furnishings and windows were provided by special donations from members of the Church of England. The building committee never considered the question of consecration. On the invitation of the house committee of the infirmary and the petition of the trustees the bishop of the diocese consecrated the chapel :—

Held, that as the trustees had the bare legal estate and no powers, and the house committee's functions, under the society's constitution, were confined to the administration and management of the infirmary, the invitation to the bishop would have been ultra vires the committee if the old chapel had not been consecrated ; but that, as the prima facie intention of all parties was to reproduce as nearly as might be the state of things existing in the old infirmary, the committee had performed merely the ministerial duty of inviting the bishop to perform the ceremony necessary to give effect to that intention by replacing the old consecrated chapel through the consecration of the new one, and that an action

CHARITY—*continued.*

for a declaration that the chapel was held on trust for the general purposes of the charity, including the holding therein of religious services whether of the Church of England or otherwise, failed. SUTTON *v.* BOWDEN **Farwell L.J. 518**

COAL MINES.
See under MINES.

COAL MINES ACT, 1911 – – – 50
See SETTLED LAND. 1.

COLLIERIES.
See under MINES.

COMPANIES (WINDING-UP) RULES, 1902, rr. 2, 42 – – – – – 218
See COMPANY. 10.

COMPANY — *Debentures — Floating Charge — Pari passu Clause — Interest paid to some Holders down to a later Date than to others—Distribution of Assets in Debenture-holder's Action—Claim by other Holders to be paid Difference in Interest in full.*

Where debentures are charged by way of floating security to rank pari passu as a first charge on the property of the company "without any preference or priority over one another," and when the security comes to be enforced in a debenture-holder's action it appears that some debenture-holders have been paid interest by the company while a going concern down to a later date than other debenture-holders, the latter (in the absence of some express provision to that effect) are not entitled to have the assets applied in equalizing the amount of interest before any further distribution is made, but the amount found due to each debenture-holder for principal and interest ought to be calculated down to the date of the Master's certificate and the assets ought to be distributed rateably according to the amounts so found due. *In re* MIDLAND EXPRESS, LIMITED. PEARSON *v.* THE COMPANY – – – **Sargant J. 499**

2. —— *Debentures — Jeopardy—Meaning of Jeopardy—Trust Deed—Power of Modification—Majority of Debenture-holders—Debentures payable pari passu—Resolution sanctioning Sale by Company of all its Assets and Division amongst Debenture-holders accepting Lowest Price — Invalidity.*

Where a company is not being pressed or threatened by outside creditors, and there is no risk of its assets being seized on their behalf, the mere fact that the security of the debenture-holders is very inadequate is not a sufficient reason for appointing a receiver on the ground of jeopardy.

In re Victoria Steamboats, Ld. [1897] 1 Ch. 158, distinguished.

Debentures were issued under a trust deed providing for their payment pari passu. The provisions of the trust deed might be modified by a resolution passed by a three-fourths majority of the debenture-holders in general meeting :—

Held, that it was not competent for such a majority to sanction a sale by the company of

COMPANY—*continued.*

all its assets and a division of the proceeds not rateably amongst all the debenture-holders, but amongst those willing to accept the lowest price for their debentures. *In re* NEW YORK TAXICAB COMPANY. SEQUIN *v.* THE COMPANY.
Swinfen Eady J. 1

3. —— *Liquidation—Claim against Firm of Promoters for Secret Profit—Liability of Partners — Joint and Several Liability — Distinct Contracts—Right of Double Proof—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 18.

The firm of L. & Co., in which G. and D. were the sole partners, were promoters of a company and sold to the company a business belonging to G. and D. at a large secret profit. The company went into compulsory liquidation. Both G. and D. were bankrupt. G. had no assets, but the liquidator proved against D.'s estate for a large sum as damages for breach of trust and received a dividend of 3*s.* in the pound, amounting to 2109*l.* Out of this money and other assets he was prepared to return to the preference shareholders a portion of their capital. Two preference shareholders were mere nominees of L. & Co. The liquidator claimed to retain the dividends payable to these nominees and set them off against the amount due from L. & Co. in respect of their secret profit:—

Held, that there were no distinct contracts between the firm of L. & Co. and the partners in that firm with the gas company, and that consequently r. 18 of Sched. II. to the Bankruptcy Act, 1883, did not apply; there was no right of double proof, and the liquidator, having elected to prove against the estate of one of the partners, had no right to prove against the joint estate of the firm of L. & Co., and there could be no set-off. *In re* KENT COUNTY GAS LIGHT AND COKE COMPANY, LIMITED – **Neville J. 92**

4. —— *Meeting—Poll—Adjournment ad hoc —Proxies to be lodged forty-eight Hours before Meeting "or Adjourned Meeting"—Poll fixed for Future Date—No Adjournment of Meeting —Validity of Proxies lodged forty-eight Hours before Poll.*

A poll demanded at a company meeting was directed to be taken at a future date, but the meeting itself was not adjourned:—

Held, that the mere postponement of the poll was not an adjournment ad hoc of the meeting within the meaning of an article allowing the lodgment of proxies forty-eight hours before a meeting "or adjourned meeting," but the original meeting continued for the purpose of the poll, and no fresh proxies could be lodged.

Reg. v. *Wimbledon Local Board* (1882) 8 Q. B. D. 459, 462, 464, 465, followed. SHAW *v.* TATI CONCESSIONS, LIMITED
Swinfen Eady J. 292

5. —— *Reconstruction — Compromise or Arrangement—Sale—Dissentient Shareholders—Power to bind—Petition—Sanction of the Court —Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 120, 192.

A company proposed to sell its assets and undertaking to a new company to be formed for that purpose and to compel shareholders to accept shares in the new company instead of their shares in the old company. The creditors were to be taken over by the new company. There was no provision for preserving the rights of dissentient shareholders. On a petition for the sanction of the Court:—

Held (reversing the decision of Neville J.), that the scheme was not a compromise or arrangement which could be sanctioned under s. 120 of the Companies (Consolidation) Act, 1908. *In re* GENERAL MOTOR CAB COMPANY, LIMITED – – – – – **C. A. 377**

6. —— *Reconstruction—Notice of Dissent— Form of Notice—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 192, *sub-s.* 3.

A notice under s. 192, sub-s. 3, of the Companies (Consolidation) Act, 1908, dissenting from a resolution for reconstruction, must not only contain a declaration of dissent, but must also expressly give the liquidator the option, either to abstain from carrying the resolution into effect, or to purchase the dissentient member's interest.

Dictum of Jessel M.R. in *In re Union Bank of Kingston-upon-Hull* (1880) 13 Ch. D. 808, 810, followed. *In re* DEMERARA RUBBER COMPANY, LIMITED – – – **Swinfen Eady J. 331**

7. —— *Sale of Undertaking and Assets in Consideration of Shares in Purchasing Company —Distribution of Proceeds—Power in Memorandum of Association — Resolutions — Special Resolution — Dissentients — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 192.

A company which has power under its memorandum of association to sell all or any part of its business or property to another company in consideration of shares in that company, and also power to distribute such shares among its own members, does not fulfil the requirements of s. 192, sub-s. 1, of the Companies (Consolidation) Act, 1908, by passing merely an ordinary resolution sanctioning such a sale and special resolutions providing for voluntary liquidation and the mode of distribution of the compensation shares.

To comply with s. 192, sub-s. 1, there must at least be a special resolution authorizing the liquidator to accept shares as the consideration for the sale. In the absence of such a special resolution there would be no special resolution to which the provision relating to dissentients in sub-s. 3 of s. 192 could apply.

Semble, that a special resolution passed on a show of hands—no poll being demanded—by a three-fourths majority, as provided by s. 69 of the Act, and subsequently confirmed, is sufficient to satisfy the requirements of s. 192 and validate the sale, notwithstanding a provision in the company's articles of association that every special resolution should, unless resolved on without a dissentient, be decided by poll.

Bisgood v. *Henderson's Transvaal Estates, Ld.* [1908] 1 Ch. 743, applied. ETHERIDGE *v.* CENTRAL URUGUAY NORTHERN EXTENSION RAILWAY COMPANY, LIMITED – **Joyce J. 425**

COMPANY—*continued.*

8. —— *Scheme of Arrangement—Increase of Capital — Reorganization of Share Capital — Alteration of Rights defined by Memorandum—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 45, 120.

A scheme of arrangement which alters any rights defined by the memorandum of association must satisfy the conditions laid down by s. 45 of the Companies (Consolidation) Act, 1908, although the scheme does not include the consolidation of different classes of shares or the division of shares into shares of different classes.

In re Palace Hotel, Ld. [1912] 2 Ch. 438, not followed. *In re* DOECHAM GLOVES, LIMITED. – – – – **Neville J. 226**

9. —— *Voluntary Winding-up—Summons in Winding-up to rescind Contract—Jurisdiction—Discretion of Court—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 193, 215.

A company was formed for the purpose of entering into, and had executed, an agreement for the purchase of certain options. The articles of association provided that it should be no objection to the agreement that the vendors were promoters and directors and stood in a fiduciary relation to the company. The options depended on an agreement between the vendors and the French owners of a business; this agreement was disputed, and ultimately declared void by a French Court. The company then went into voluntary liquidation, and the liquidators took out this summons to set aside the agreement between the company and the vendors:—

Held, that it was doubtful whether the Court had jurisdiction on a summons under s. 193 to set aside a contract, but if it had such jurisdiction it was discretionary and ought not to be exercised in this case; and no proceedings could be taken against the directors for misfeasance under s. 215 until the agreement, which was valid according to the constitution of the company, had been set aside. *In re* CENTRIFUGAL BUTTER COMPANY, LIMITED **Neville J. 188**

10. —— *Winding-up—Pending Action in King's Bench Division—The Company and other Parties Defendants—Fraud alleged—Transfer to Winding-up Court—Practice—Companies (Winding-up) Rules*, 1909, *rr.* 2, 42—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 142.

Rule 42 of the Companies (Winding-up) Rules, 1909, which empowers the judge of the winding-up Court to transfer to that Court any action by or against a company which, at the date of the winding-up, is pending in any other Court, extends to actions in which other parties as well as the company are defendants.

So *held* by the Court of Appeal, affirming the decision of Neville J.

Where, therefore, at the date of the liquidation an action was pending in the King's Bench Division against the company, its directors and promoters, to set aside an agreement on the ground of misrepresentation and fraud, and the plaintiffs in the action obtained leave under s. 142 of the Companies (Consolidation) Act, 1908, to continue the action against the company, and

COMPANY—*continued.*

subsequently after close of pleadings set it down for trial with a jury, the judge of the winding-up Court in the exercise of his discretion under r. 42, and on the application of the liquidator and with the consent of the defendant directors and promoters, transferred the action to that Court notwithstanding the opposition of the plaintiffs, and the Court of Appeal refused to interfere with the exercise of his discretion. *In re* PACAYA RUBBER AND PRODUCE COMPANY, LIMITED **C. A. 218**

11. —— *Winding-up—Unregistered Company—Friendly Society not registered under the Friendly Societies Acts — Jurisdiction — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 267, 268.

The Court has jurisdiction to wind up under the Companies Acts as an unregistered company a friendly society which has not been registered under the Friendly Societies Acts or any other Acts.

The winding-up order will be made if a large majority of members desire it, notwithstanding that an action is pending in which the society could be wound up. *In re* VICTORIA SOCIETY, KNOTTINGLEY – – – **Neville J. 167**

—— Sale of goods — Non-acceptance — Goods ordered to be manufactured—Measure of damages — Company — Voluntary winding-up—Proof—Double profit **465**
See SALE OF GOODS.

—— Tenant for life and remainderman — Shares in company—Reserve fund—Bonus dividend—New shares — Option —Capital or income – – – **23**
See SETTLEMENT. 6.

—— Tramway company.
See under TRAMWAY COMPANY.

—— Will—Bequest of shares or of money to buy the shares—Shares in private company — Dividend, whether apportionable—"Public company" – **231**
See WILL. 3.

COMPENSATION—Settled land—Improvements — Conversion into building estate — Agricultural improvements — Capital money – – – – – **142**
See SETTLED LAND. 2.

—— Tramway company — Abandonment — Deposit—Landowner—Statutory obligation – – – – – **170**
See TRAMWAY COMPANY.

COMPOUND SETTLEMENT.
See under SETTLEMENT.

COMPROMISE — Company — Reconstruction—Compromise or arrangement – **377**
See COMPANY. 5.

CONSECRATION — Charity — Hospital—Consecrated chapel — Rebuilding — New chapel—Effect of consecration – **518**
See CHARITY. 2.

CONTRACT—Action founded on "breach of contract" — Foreclosure summons — Service out of the jurisdiction — Practice – – – – – **254**
See MORTGAGE.

—— Company — Voluntary winding-up — Summons in winding-up to rescind contract — Jurisdiction—Discretion of Court – – – – – **188**
See COMPANY. 9.

—— Sale of goods.
See under SALE OF GOODS.

CONVERSION — Partition action — Infant—Request for sale — Sale for infant's benefit – – – – – **284**
See PARTITION.

CONVEYANCING AND LAW OF PROPERTY—Infant — Maintenance — Maintenance clause in will ceasing on marriage—"Contrary intention" – – **350**
See INFANT. 1.

—— Water—Artificial watercourse—Mill stream—Riparian proprietors—Common owner—Easement—Presumption from user—General words – – – – **571**
See WATER.

COSTS—Patents.
See under PATENT.

—— Solicitors' costs.
See under SOLICITOR.

—— Trade union—Slander on officer as such—Action by officer—Indemnity by union against costs—Ultra vires – – **259**
See MAINTENANCE OF SUIT.

COVENANT—After-acquired property — Covenant to settle—Acquisition of property—Effect of covenant in equity—Lapse of time – – – – – **9**
See SETTLEMENT. 1.

—— After-acquired property — Covenant to settle—Power to appoint money—Will—Trusts referring to settlement trusts—Power to appoint similar sum – **325**
See SETTLEMENT. 4.

—— After-acquired property — Covenant to settle — Settlement — Divorce—Decree nisi – – – – – – **155**
See HUSBAND AND WIFE.

CUL-DE-SAC—Building owner's right to enclose dead end of cul-de-sac—Alleged highway—Dedication—Evidence – **337**
See BUILDINGS.

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

CYPRÈS—Charity—Gift for a school—Failure of particular object – – – **314**
See CHARITY. 1.

DAMAGES — Lease — Covenant to repair—Unassignability of right to damages for waste – – – – – **98**
See LANDLORD AND TENANT. 1.

—— Sale of goods — Non-acceptance—Measure of damages — Company — Voluntary winding-up—Proof—Double profit **465**
See SALE OF GOODS.

DEATHS (BIRTHS, MARRIAGES, AND)—Non-parochial registers — Certificates of recording clerk—Admissibility – **392**
See EVIDENCE.

DEBENTURE-HOLDERS AND DEBENTURES—Company.
See under COMPANY.

"DEBTS"—Right of principal to indemnity by surety against liability — Will — Construction – – – – – **201**
See PRINCIPAL AND SURETY.

DEDICATION—Highway.
See under HIGHWAY.

DEED OF GIFT—*Gift of Chattels—Void Deed—Acknowledgment — Voluntary Gift—Knowledge of Donor — Delivery of Deed by Donor — Redelivery—Passing of Property.*

On February 26, 1896, a deed of gift was executed by Mrs. S. by her attorney, S. L., by which in consideration of natural love and affection she gave to her daughter Miss S. all the pictures, chattels, and effects in her house, 5, Chesterfield Gardens, which were set out in a list made by her late husband. In 1898 her solicitor, amongst other business matters, read over the deed of gift to her and made the following note of the interview so far as it related to the deed :—"Attending you as to the deed of gift to Miss S. and you desired us to retain same on her behalf. You would have a copy made of the original inventory and would send us the original to keep with the deed. Also as to the P. A. given to" S. L. "and reminding you this had been prepared by Mr. M. and had never been in our possession." Shortly afterwards she sent the inventory to her solicitor with a note on it in her handwriting as follows: "Mr. S.'s catalogue with annotations of pictures and works of art at 5, Chesterfield Gardens, now the property of Miss S." Mrs. S. subsequently changed her house and parted with some of the articles. She and her daughter lived together till in 1901 the daughter in consequence of her mental condition had to be placed under medical care. In an affidavit as to her daughter's property made in lunacy proceedings in 1902 Mrs. S. did not mention the articles the subject of the deed of gift. By her will made in 1910 Mrs. S. gave her pictures, furniture, and effects upon trust for her daughter for life and then for other persons. Mrs. S. died in April, 1911. It turned out that the power of attorney was not sufficiently wide to authorize S. L. to execute the deed of gift; and the trustees took out a summons to determine whether the chattels passed under the will or whether Mrs. S. had

DEED OF GIFT—*continued.*

delivered or redelivered the deed so as to make it a valid operative instrument :—

Held by Joyce J. and by the Court of Appeal, that in 1898 there was such an acknowledgment by Mrs. S. of the deed of gift that it became a deed binding on her ; that what passed must be treated as a delivery or redelivery of the deed ; that her knowledge that she was doing something to validate the transaction was immaterial ; and that the pictures and furniture passed to the daughter. *In re* SEYMOUR. FIELDING *v.* SEYMOUR - - - - - - **C. A. 475**

DELIVERY — Gift of chattels—Void deed — Acknowledgment — Voluntary gift — Knowledge of donor—Delivery of deed by donor—Redelivery—Passing of property - - - - - **475**
See DEED OF GIFT.

DEPOSIT—Tramway company—Abandonment —Deposit—Landowner—Compensation —Statutory obligation - - **170**
See TRAMWAY COMPANY.

DEVASTAVIT — Executor — Administration — Creditor's action—Statute of Limitations - - - - - **358**
See ADMINISTRATION.

DEVISE—Will—Construction.
See under WILL.

DISCLAIMER — *Legacy — Right to retract — Trust Legacy—Successive Life Interests—Refusal by First Life Tenant to receive Income—Payment to Second Life Tenant—Death of Second Life Tenant—Right of First Life Tenant to retract Refusal quoad Future Income.*

Trustees accepted and held a trust legacy in trust for the plaintiff for life and after her death for her son for life and after his death for the residuary legatees, but the plaintiff, being annoyed at the terms of the will, refused to receive the income, and with her consent it was paid to her son.

On the death of her son eight years later the plaintiff retracted her refusal quoad future income.

The residuary legatees took the view that the plaintiff's refusal amounted to a disclaimer of her interest in the legacy and could not be retracted :—

Held, that the plaintiff's refusal to receive the trust income could not be treated on the footing of disclaimer of a legacy and that, as neither the trustees nor residuary legatees had changed their position on the faith of that refusal, it could be retracted quoad future income.

Semble. Notwithstanding the passage in Sheppard's Touchstone, 7th ed. p. 452, an actual disclaimer, until acted on, may be retracted. *In re* YOUNG. FRASER *v.* YOUNG
Swinfen Eady J. 272

DIVIDENDS— Income tax — Deductions from dividends before tax imposed by statute - - - - - **57**
See REVENUE. 2.

DIVIDENDS—*continued.*

—— Shares in company—Tenant for life and remainderman—Reserve fund—Bonus dividend - - - - - **23**
See SETTLEMENT. 6.

—— Whether apportionable — Will—Construction - - - - - - **231**
See WILL. 3.

DIVORCE — Settlement — Covenant to settle after-acquired property—Decree nisi—Property, whether caught by covenant
See HUSBAND AND WIFE. **155**

DUTY—Inland Revenue.
See under REVENUE.

EASEMENT—Water—Artificial watercourse — Mill stream — Riparian proprietors — Common owner — Presumption from user—General words - - - **571**
See WATER.

—— Way, Right of.
See under WAY, RIGHT OF.

ECCLESIASTICAL LAW — Tithe — Bankruptcy of incumbent—Sequestration of benefice —Tithes paid under mistake of fact to sequestrator appointed by bishop—Payment by bishop to trustee in bankruptcy - - - - - **127**
See TITHES.

ESTATE DUTY—Inland Revenue.
See under REVENUE.

ESTATE TAIL—Will—Legal devise—Technical words—A. and "his issue male in succession" — Words of explanation — Intended devolution explained - **552**
See WILL. 4.

EVIDENCE—*Public Documents—Non-Parochial Registers—Society of Friends — Births, Marriages, and Deaths — Digest — Certificates of Recording Clerk — Admissibility — Non-Parochial Registers Act*, 1840 (3 & 4 *Vict. c.* 92), *ss.* 6, 9.

The registers of births, marriages, deaths and burials kept by the Society of Friends prior to July 1, 1837, when the Births [Marriages] and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), came into operation, were not evidence at common law.

Ex parte Taylor (1820) 1 Jac. & W. 483 (Public Library Register of Dissenters' Births), and *Whittuck* v. *Waters* (1830) 4 C. & P. 375 (Wesleyan Chapel Register of Burials), applied.

On being deposited at Somerset House under the Non-Parochial Registers Act, 1840, these registers became statutory evidence under s. 6, but entries therein are only provable by production of the original registers or by a certificate under the seal of the General Register Office under s. 9.

A certificate certified by the recording clerk of the Society as a true extract from the Society's digest of those registers is inadmissible (*a*) on the above grounds and (*b*) on the ground that it is only an extract from a digest of

EVIDENCE—*continued.*

registers that are still in existence. *In re* WOODWARD. KENWAY *v.* KIDD **Swinfen Eady J. 392**

—— Practice—Action tried in Chancery Division with witnesses—Form of order—Appeal—Schedule of evidence — Oral and documentary evidence – – **492**
See PRACTICE. 1.

EXECUTOR — Devastavit — Administration — Creditor's action — Representative of deceased executor—Payment to beneficiaries more than six years before action—Statute of Limitations – **358**
See ADMINISTRATION.

EXPULSION—Member—Trade union – **366**
See TRADE UNION.

FINANCE ACTS.
See under REVENUE.

FISH—Fried fish shop—Nuisance—Injunction
See NUISANCE. **269**

FLOATING CHARGE—Pari passu clause—Interest—Distribution of assets in debenture-holder's action – – – **499**
See COMPANY. 1.

FORECLOSURE—Mortgage.
See under MORTGAGE.

FORFEITURE—Protected life estate—Advancement clause — Whether advances to appointees valid—Whether life estate forfeited – – – – – **34**
See SETTLEMENT. 5.

—— Will — Construction — Determinable life interest—Receiving order — Discharge of order – – – – – **298**
See WILL. 2.

FRAUD — Company — Winding-up — Pending action in King's Bench Division — Fraud alleged—Transfer to winding-up Court—Practice – – – **218**
See COMPANY. 10.

FRIENDLY SOCIETY — Winding-up—Unregistered company—Friendly society not registered under the Friendly Societies Acts—Jurisdiction – – – **167**
See COMPANY. 11.

FRIENDS, SOCIETY OF—Non-parochial registers—Births, marriages, and deaths—Certificate of recording clerk—Admissibility – – – – – **392**
See EVIDENCE.

GAS—Highway—Dedication—Gas pipes—Power to gas company to break up street—Subsoil—Ownership – – – **118**
See HIGHWAY.

GENERAL WORDS — Easement — Presumption from user — Conveyancing and Law of Property Act, 1881 – – – **571**
See WATER.

GIFT—Deed of.
See under DEED OF GIFT.

GOODS—Sale of.
See under SALE OF GOODS.

HIGHWAY—*Dedication—Gas Pipes—Power to Gas Company to break up Street—Subsoil—Ownership—"Land not dedicated to public use"—Gasworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 15), *ss.* 6, 7—*Worthing Gas Act*, 1907 (2 *Edw.* 7, *c. lxxxix.*), *ss.* 5, 7, 39

By s. 6 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), the undertakers were authorized to break up the soil of streets within the limits of their special Act, and to lay down pipes and other works therein for supplying gas to the inhabitants of the district.

Sect. 7 provided that nothing therein should authorize the undertakers to lay down any pipe or other works "in any land not dedicated to public use, without the consent of the owners and occupiers thereof."

The plaintiff was the owner of land on either side of a road dedicated to public use and had bored a tunnel thereunder for his own purposes. In pursuance of their statutory powers the defendants proposed to lay gas pipes and works extending to a depth of five feet below the surface of the road on either side of the tunnel, such pipes being carried up at right angles to the tunnel, and passing over it at a depth of three inches from the surface. It was agreed that eighteen inches was the thickness of soil under the road reasonably necessary for the proper maintenance of the road. The question raised in the action was whether the soil to a greater depth than eighteen inches from the surface was "land not dedicated to public use":—

Held, that the dedication of the road to public use brought it within s. 6 of the Gasworks Clauses Act, 1847, and no part of it could, for the purposes of gas or water undertakings, be properly held to be land "not dedicated to public use" under s. 7. The proviso in that section extended only to land of which no part was dedicated to public use.

Dedication, as between the owner of the soil on the one hand and the controlling authority on the other, involves not merely the occupation by the public of the surface, but also the dedication of so much of the subjacent soil as is necessary for the proper maintenance of the surface as a road or street. SCHWEDER *v.* WORTHING GAS LIGHT AND COKE COMPANY (No. 2) – – – – – – **Eve J. 118**

—— Cul-de-sac — Alleged highway—Dedication — Evidence – – – – **337**
See BUILDINGS.

HOSPITAL — Charity — Consecrated chapel—Rebuilding — New chapel — Effect of consecration – – – – – **518**
See CHARITY. 2.

HOTCHPOT CLAUSE — Settlement by will—Construction—Several settled funds—Trusts by reference – – – **303**
See SETTLEMENT. 2.

HUSBAND AND WIFE—*Settlement—Covenant to settle After-acquired Property—Divorce—Decree Nisi—Wife becoming entitled to Property between Decree Nisi and Decree Absolute—Property, whether caught by Covenant.*

By a marriage settlement dated in 1879, it was expressly agreed that if the wife during the then intended coverture, or her husband in her right, should at one and the same time and from the same source become entitled to any real or personal property of the value of 200*l.* or upwards the property should be settled. On January 12, 1911, a decree nisi for the dissolution of the marriage was pronounced. On January 22, 1911, the wife became entitled under her mother's will to certain funds which exceeded in value the amount mentioned in the settlement. On July 24, 1911, the decree nisi was made absolute:—

Held, that the funds fell into possession during the coverture contemplated by the settlement and were therefore bound by the covenant to settle after-acquired property.

Norman v. *Villars* (1877) 2 Ex. D. 359, and *Hulse* v. *Hulse* (1871) L. R. 2 P. & M. 259, followed.

In re Pearson's Trusts (1872) 20 W. R. 522; 26 L. T. 393, discussed but not followed. SINCLAIR *v.* FELL – – **Warrington J. 155**

"IMPROVEMENTS" — Collieries — Works required by Coal Mines Act, 1911—Payment out of capital – – **50**
See SETTLED LAND. 1.

INCOME — Capital or — Shares in company — Reserve fund—Bonus dividend – **23**
See SETTLEMENT. 6.

INCOME TAX — Deductions from dividends before tax imposed by statute – **57**
See REVENUE. 2.

—— Landlord's property tax — Payment by tenant—Omission to deduct from next payment of rent—Right to deduct from future payments – – – **16**
See LANDLORD AND TENANT. 2.

INDEMNITY—Right of principal to indemnity by surety against liability—Will—Construction—"Debts" – – – **201**
See PRINCIPAL AND SURETY.

—— Stockbroker — Open account — Death of client before settling day — Duty of broker—Reduction of amount of client's indemnity—Closing account—Liability of broker to account – – – **565**
See PRINCIPAL AND AGENT.

—— Trade union—Slander on officer as such—Action by officer—Indemnity by union against costs—Ultra vires – – **259**
See MAINTENANCE OF SUIT.

INFANT—*Maintenance—Maintenance Clause in Will ceasing on Marriage—Interval between Marriage and attaining twenty-one—Income accruing before Marriage—"Contrary intention"—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

Testator, who died in 1909, directed his trustees to appropriate a share of his estate in favour of one of his daughters, and to hold the same and the accumulations (if any) of income made during her minority and discoverture upon trust from the time she attained the age of twenty-one years or previously married to pay the income to her during her life and after her death to hold the capital and income or so much thereof respectively as should not have been paid or applied under any trust or power affecting the same in trust for her issue as therein mentioned with a gift over in default of issue; and the testator declared that if at his decease any child or grandchild entitled in expectancy for life or absolutely to a share or the income thereof under his will should be under the age of twenty-one years, or being a female should be unmarried, the trustees might apply the whole or any part of the income of such expectant share of such minor for or towards his or her maintenance, and should invest the residue (if any) of the said income and the resulting income thereof at compound interest to the intent that such accumulations should be added to the principal share from which the same should have arisen and follow the destination thereof, with power for the trustees to resort to the accumulations of any preceding year and apply the same for or towards the maintenance of any person for the time being presumptively entitled thereto.

The daughter attained the age of twenty-one years on October 1, 1912, having previously married on June 12, 1912. The share consisted largely of property in Australia the income of which did not reach the hands of the trustees in this country for many months after it had accrued due. The trustees had applied income for the maintenance of the daughter down to the date of her marriage, when they ceased to do so. On a summons raising the question whether the trustees had power to apply income accruing down to the date of her marriage for the maintenance of the daughter after that date:—

Held, that the maintenance clause in the will did not shew a "contrary intention" so as to exclude s. 43 of the Conveyancing Act, 1881, and that under that section the trustees had power to apply income accruing down to the date of the marriage for the maintenance of the daughter between the date of her marriage and the date of her attaining the age of twenty-one years, but not for any further period.

In re Thatcher's Trusts (1884) 26 Ch. D. 426, followed.

In re Wise [1896] 1 Ch. 281; 73 L. T. 743, explained. *In re* COOPER. COOPER *v.* COOPER **Farwell L.J. 350**

2. —— *Maintenance — Necessaries — Reversion in Fee in Real Estate—Loan—Charge—Security—Judgment—Land Charges Act*, 1900 (63 & 64 *Vict. c.* 26), *s.* 2.

An infant ward of Court had no property except a reversionary interest in real estate expectant on the death of a lady aged eighty-five. The infant lived with her mother, who had

INFANT—*continued.*

no means. An allowance of 80*l.* a year had been paid to them for maintenance under an order of the Court, but the fund out of which this had been paid was now exhausted. This was a summons by the infant by her next friend asking for authority to procure annual loans for the purpose of supplying her with necessaries pending the falling in of her reversionary interest, and that each such advance and the interest thereon might be declared to be a debt incurred for and on behalf of the infant for necessaries, and to be payable out of her estate; and that the infant might be bound on attaining her majority to ratify and confirm such contracts and to do everything necessary to give a valid security upon her reversionary interest in case the same had not then fallen into possession :—

Held, that the Court was bound by the decision in *Cadman* v. *Cadman* (1886) 33 Ch. D. 397; that the Land Charges Act, 1900, had not altered the law in this respect, and, in the absence of any property of the infant which could be reached, the Court could not make such an order. *In re* BADGER, DECEASED. *In re* BADGER, AN INFANT. BADGER v. BADGER C. A. 385

—— Partition action—Request for sale—Sale for infant's benefit—Conversion – 284
See PARTITION.

INFRINGEMENT—Patent – – – 150
See PATENT.

INJUNCTION—Fried fish shop—Nuisance 269
See NUISANCE.

—— Trade union—Rules—Parliamentary levies—Expulsion of member—Ultra vires—Unregistered association—Parties 366
See TRADE UNION.

—— Way, Right of – – – –
See under WAY, RIGHT OF.

INTEREST—Floating charge—Pari passu clause—Distribution of assets in debenture-holder's action – – – – 499
See COMPANY. 1.

INTESTACY — Realty — Devise — Life estate — Remainder to "my nearest male heir"—"My nearest and eldest male relative"—No male heir—Heiress-at-law – 376
See WILL. 5.

INVESTMENT—Trustee—Mortgage—Breach of trust — Insufficient security — "Two-thirds" limit—Duty of valuer – 200
See TRUSTEE.

JEOPARDY—Company—Debentures—Meaning of jeopardy — Trust deed — Power of modification – – – – 1
See COMPANY. 2.

JURISDICTION—Company—Winding-up.
See under COMPANY.

JURISDICTION—*continued.*

—— Mortgagor and mortgagee—Service out of the jurisdiction—Foreclosure summons—Action founded on "breach of contract" – – – – – 254
See MORTGAGE.

—— Trade mark—Registration. – – 191
See TRADE MARK. 2.

KNOWLEDGE—Gift of chattels—Void deed—Acknowledgment — Voluntary gift — Knowledge of donor—Delivery of deed by donor — Redelivery — Passing of property. – – – – – 475
See DEED OF GIFT.

LAND CHARGES — Infant — Maintenance — Necessaries—Reversion in fee in real estate — Loan — Charge — Security — Judgment – – – – 385
See INFANT. 2.

LANDLORD AND TENANT—*Lease—Covenant to repair — Waste — Assignment of Right to Damages — Construction — Unassignability of Right to Damages for Waste—Implied Covenant by Tenant not to commit Waste.*

A right of action for damages in the nature of waste being in respect of a tort is, on grounds of public policy, not capable of assignment.

By a lease dated in 1906 certain business premises were demised to the plaintiff for a term of forty-one and a half years. The lease contained the usual covenants by the lessee to repair. The plaintiff took the lease as trustee for a company, and the company entered into occupation of the premises. On March 19, 1909, a receiver and manager of the company's property was appointed in a debenture-holders' action, and on March 25, 1909, the company went into voluntary liquidation. On May 2, 1911, the company by its liquidator and the receiver entered into an agreement with the defendant for the sale to him of the fixed plant and machinery of the business. By clause 14 of the agreement it was provided that the defendant was to be entitled to occupy the premises for the purpose of removing the plant and machinery until September 29, 1911, upon certain conditions, one of which was that he was not to do anything which if done by the lessee would be a breach of the covenants and conditions contained in the lease. It was also provided that the defendant was to make good to the satisfaction of the lessor all damages done in removing the tenant's fixtures agreed to be sold. The agreement was approved by the Court in the debenture-holders' action and the defendant was let into possession of the premises. Whilst in possession the defendant committed certain acts which were alleged to constitute waste. Upon his going out of possession on September 29, 1911, the plaintiff was let into possession, and by a deed dated November 6, 1911, the company's interest in the premises was released to the plaintiff, together with the

LANDLORD AND TENANT—*continued.*

benefit of clause 14 of the agreement of May 2, 1911, and the full power to enforce the obligations under that clause :—

Held, upon the constructon of the assignment of November 6, 1911, that it did not purport to assign to the plaintiff any right of action for tort in respect of waste, but only in respect of breaches of covenant.

Held, also, that if the assignment had purported to assign any such right the assignment would have been invalid, inasmuch as such a right is not assignable, according to the established rule which has not been changed.

Fitzroy v. *Cave* [1905] 2 K. B. 364, followed.

Dictum of Lord Esher M.R. in *Whitham* v. *Kershaw* (1885) 16 Q. B. D. 613, 616, that "There is an implied covenant on the part of the tenant not to commit waste," dissented from.

Decision of Warrington J. affirmed. DEFRIES *v.* MILNE – – – – – **C. A. 98**

2. —— *Lease — Landlord's Property Tax — Payment by Tenant—Omission to deduct from next Payment of Rent—Right to deduct from future Payments—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *Sched. (A), No. IV., r.* 9—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

By a lease dated in 1907, certain premises were demised to a company, and the company thereby covenanted to pay the rent and taxes in respect thereof, except land tax and landlord's property tax. The company never paid any of the rent reserved, but made certain payments in respect of landlord's property tax. In 1911 a debenture-holders' action was commenced and a receiver was appointed. Subsequently the lessor threatened to distrain for the rent in arrear, and in order to avoid distress the receiver signed an undertaking by which he undertook to pay an occupation rent, and also to pay the "arrears of rent" then owing out of a particular fund. The receiver paid one year's landlord's property tax, and subsequently made a payment of occupation rent without deducting anything for property tax :—

Held, that the joint effect of Sched. (A), No. IV., r. 9, of the Income Tax Act, 1842, and s. 40 of the Income Tax Act, 1853, was to treat the payment by a tenant of landlord's property tax as a pro tanto payment of rent.

Held, therefore, that the receiver was entitled to deduct the payments made by the company and himself in respect of landlord's property tax from any future payments of rent to be made by him under his undertaking. *In re* STURMEY MOTORS, LIMITED. RATTRAY *v.* STURMEY MOTORS, LIMITED – – **Warrington J. 16**

LANDLORD'S PROPERTY TAX—Payment by tenant—Omission to deduct from next payment of rent—Right to deduct from future payments – – – **16**
See LANDLORD AND TENANT. 2.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

LEASEHOLD HOUSE—Specific bequest—Rent and outgoings to be paid out of general estate—Sale by life tenant—Ordinary application of proceeds – – **277**
See SETTLED LAND. 3.

LEGACY—Disclaimer.
See under DISCLAIMER.

—— Will—Construction.
See under WILL.

LIMITATIONS, STATUTE OF—Administration—Creditor's action—Representatives of deceased executor — Devastavit — Payment to beneficiaries more than six years before action – – – **358**
See ADMINISTRATION.

—— Marriage settlement—After-acquired property, Covenant to settle—Acquisition of property—Effect of covenant in equity—Lapse of time – – **9**
See SETTLEMENT. 1.

LOCAL AUTHORITY— Streets — Paignton Improvement Act, 1898—Urban authority —Building owner – – – **337**
See BUILDINGS.

LOCAL GOVERNMENT—*District Council—Public Right of Way—Assertion of Right by District Council — Threat and Intent to exercise Right by Servants or Agents—Action by Landowner for Declaration and Injunction—Reasonable Cause of Action—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.

If a district council, acting under s. 26 of the Local Government Act, 1894, assert that there is a public right of way over the plaintiff's close and threaten and intend to exercise it by their servants or agents, an action for a declaration and injunction will lie against them.

Shafto v. *Bolckow, Vaughan & Co.* (1887) 34 Ch. D. 725, 728, applied.

Whether the mere assertion that there is a public right of way and the mere provision of legal assistance for the defence of private individuals, who prior to the assertion and without any reference to the district council have exercised the alleged right on their own behalf and been sued in trespass accordingly, would without more give rise to any cause of action against the district council, *quære*. THORNHILL *v.* WEEKS **Swinfen Eady J. 438**

LONDON — *Metropolis Management — Streets—Widening—Power to take Part of House—Wishes of Owner—Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

In order to justify the taking of part only of a house under the provisions of Michael Angelo Taylor's Act, the facts must be such that the local authority acting in a quasi-judicial capacity can honestly come to the conclusion that it is unnecessary to take the whole. Such a conclusion cannot be come to where the taking of the part in question will destroy the house as a house. The fact that by reconstruction the mutilated carcase may be converted into a house even of substantially the same character as before

LONDON—*continued.*

is immaterial, inasmuch as the owner cannot be compelled to effect such a reconstruction.

There is no reason for confining the meaning of the word "necessary" in s. 80 of the Act to physical necessity. The wishes and intention of the owner as well as the physical condition of the house may be circumstances to be taken into account by the local authority in making their adjudication.

Statement of Buckley J. in *J. L. Denman & Co., Ld.* v. *Westminster Corporation* [1906] 1 Ch. 464, 478, adopted and followed. DAVIES *v.* CORPORATION OF THE CITY OF LONDON
Warrington J. 415

MAINTENANCE—Infant.
See under INFANT.

MAINTENANCE OF SUIT—*Common Interest—Trade Union—Slander on Officer as such—Action by Officer—Indemnity by Union against Costs—Ultra vires.*

A trade union has no legal common interest in a slander action brought by one of its officers, although that officer is slandered by way of his office as well as personally and the union is thereby adversely affected.

Payment of the officer's costs out of the funds of the union in pursuance of an indemnity given by the union before action is therefore obnoxious to the law of maintenance and ultra vires.

Alabaster v. *Harness* [1895] 1 Q. B. 339, 341, 344, and *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1906) 22 Times L. R. 274, 275, applied. ORAM *v.* HUTT – – – **Swinfen Eady J. 259**

MALE—Will—Construction—Realty—Devise—Life estate—Remainder to "my nearest male heir"—"My nearest and eldest male relative" – – – – **376**
See WILL. 5.

MARRIAGE SETTLEMENT.
See SETTLEMENT.

MARRIAGES—Births, marriages, and deaths—Non-parochial registers — Certificates of recording clerk—Admissibility **392**
See EVIDENCE.

MEETING—Company — Poll—Adjournment ad hoc — No adjournment of meeting—Validity of proxies lodged forty-eight hours before poll – – – **292**
See COMPANY. 4.

METROPOLIS.
See under LONDON.

MICHAEL ANGELO TAYLOR'S ACT, 1817 – 415
See LONDON.

MILL STREAM.
See under STREAM.

MINES—"Improvements" — Payment out of capital—Collieries—Works required by Coal Mines Act, 1911 – – – **50**
See SETTLED LAND. 1.

MISTAKE—Money paid under mistake of fact—Right to recover—Tithes paid under mistake of fact to sequestrator appointed by bishop – – – – **127**
See TITHES.

MORTGAGE—*Mortgagor and Mortgagee—Mortgage of Personalty—Foreclosure Summons—Action founded on "breach of contract"—Service out of the Jurisdiction—Practice—Rules of the Supreme Court, Order XI., rr.* 1 (*e*), 8A.

A foreclosure action, whether by writ or originating summons in respect of a mortgage of personalty, by the original mortgagee against the original mortgagor, is not an action founded on a breach of contract within the meaning of Order XI., r. 1 (*e*), and leave will not therefore be granted to serve the writ or summons upon the defendant out of the jurisdiction.

Decision of Neville J. [1913] 1 Ch. 181, reversed.

Deutsche National Bank v. *Paul* [1898] 1 Ch. 283, and *Kolchmann* v. *Meurice* [1903] 1 K. B. 534, followed. HUGHES *v.* OXENHAM
C. A. 254

—— Practice—Order declaring priorities and for foreclosure or sale by Court of Appeal—Appeal to House of Lords—Enlargement of time for redemption—Application to Court of first instance – – – – – – **581**
See PRACTICE. 2.

—— Trustee — Investment—Mortgage—Breach of trust—"Two-thirds" limit – **200**
See TRUSTEE.

NATIONAL DEBT ACT, 1870 – – – 57
See REVENUE. 2.

NECESSARIES — Infant — Maintenance — Reversion in fee to real estate—Loan—Charge — Security — Judgment — Land charges – – – – – – **385**
See INFANT. 2.

NON-PAROCHIAL REGISTERS ACT, 1840 392
See EVIDENCE.

NOTICE—Company—Reconstruction—Notice of dissent—Form of notice – – **331**
See COMPANY. 6.

NUISANCE—*Injunction—Fried Fish Shop.*

A fried fish shop, carried on in close proximity to a dwelling-house, may cause an actionable nuisance, and will be restrained if the evidence shews that the odour causes "an inconvenience materially interfering with the ordinary comfort physically of human existence" within the definition contained in the judgment in *Walter* v. *Selfe* (1851) 4 De G. & Sm. 315. ADAMS *v.* URSELL
Swinfen Eady J. 269

ORDER—Form of—Action tried in Chancery Division with witnesses — Appeal—Schedule of evidence – – – **492**
See PRACTICE. 1.

PAIGNTON IMPROVEMENT ACT, 1898 - 337
See BUILDINGS.

PARTIES—Trade union—Expulsion of member —Ultra vires — Injunction— Unregistered association - - - 366
See TRADE UNION.

PARTITION — *Partition Action — Infant — Request for Sale—Sale for Infant's Benefit — Conversion—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 8—*Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6—*Settled Estates Act*, 1856 (19 & 20 *Vict. c.* 120), *ss.* 23, 24, 25—*Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *ss.* 34, 35, 36.

An infant's share of the proceeds of sale of real estate sold by the Court in a partition action, though sold at his request and for his benefit, is not converted.

Foster v. Foster (1875) 1 Ch. D. 588, and *In re Barker* (1881) 17 Ch. D. 241, 243, applied.

Dicta of Jessel M.R. in *Wallace* v. *Greenwood* (1880) 16 Ch. D. 362, 365, 366, not followed.
HOPKINSON *v.* RICHARDSON
Swinfen Eady J. 284

PARTNERSHIP—Company—Liquidation—Liability of partners—Joint and several liability—Right of double proof - **92**
See COMPANY. 3.

PATENT — *Action to restrain Threats—Cross-Action for Infringement—Staying Threats Action pending Decision of Infringement Action—Costs —Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 36.

In February, 1911, the plaintiffs ascertained that the defendants were issuing threats with reference to the alleged infringement of their patent. On February 14, 1911, they wrote to the defendants with reference to the threats. On March 31, 1911, they issued their writ in the present action, and on April 13, 1911, gave notice of motion for an injunction to restrain the issue of the threats. On April 21, 1911, the defendants issued their writ against the plaintiffs for infringement of their patent. On April 25, 1911, the motion in the threats action came on for hearing, and by consent the action was stayed pending the result of the action for infringement, the costs being reserved, with liberty to apply. On December 14, 1911, judgment was given in the infringement action dismissing the action, and that judgment was subsequently affirmed by the Court of Appeal. On an application by the first plaintiffs that their action might be dismissed, but without costs :—

Held, that the plaintiffs had adopted a proper course with a view of saving expense by staying their action pending the decision of the infringement action and not putting the defendants to the expense of proving that they had complied with the proviso to s. 36 of the Patents and Designs Act, 1907, and that they were therefore entitled to have their action dismissed without costs. METROPOLITAN GAS METERS, LIMITED *v.* BRITISH, FOREIGN AND COLONIAL AUTOMATIC LIGHT CONTROLLING COMPANY, LIMITED. - - - **Warrington J. 150**

PENSIONS — Proofs — Voluntary allowance— Ultra vires — Building society — Winding-up - - - - **400**
See BUILDING SOCIETY.

PERPETUITIES—Rule against—Devise—Trust to convey to uses subsisting in another estate at death of tenant for life - **404**
See WILL. 1.

POLL — Company— Meeting — Poll — Adjournment ad hoc — No adjournment of meeting — Validity of proxies lodged forty-eight hours before poll - **292**
See COMPANY. 4.

PORTIONS — Vesting — Younger children — "Eldest or only son"—Younger son becoming eldest after vesting of portion — Right to share in portions fund - - - - - **41**
See SETTLEMENT. 3.

POWER OF APPOINTMENT — *Special and General Power over same Property—Exercise of Special Power—Will.*

In order to exercise a special power of appointment there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it ; and either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose. Where, however, two powers exist in reference to the same property it may well be that a reference to the property will not indicate any intention to exercise more than one of the powers.

Testatrix, by her will proved in 1909, gave one moiety of her residuary estate in trust for her daughter, with a direction that the income thereof was to be held in trust for her daughter during her life, and after her death the capital thereof was to be held, subject to the appointment of any life interest to any future husband of the daughter as thereinafter mentioned, upon trust for the children of the daughter living at her death who being sons should attain twenty-one, or being daughters should attain that age or marry, with a provision that if no child should attain a vested interest the share should be held in trust absolutely for such persons as the daughter should by will appoint, and in default of appointment for the testatrix's son ; and the testatrix thereby empowered her daughter by deed or will to appoint for the benefit of any future husband who might survive her during his life or any less period all or any part of the income of her share.

The daughter's first husband died in 1910, the only issue of that marriage being a daughter, who was born in 1898. In the year 1910 the testatrix's daughter married A. C., her second husband. She died in 1912, having made a will whereby she appointed A. C. guardian of her infant daughter and proceeded : "I give, devise, appoint and bequeath, all my estate, property and effects, whatsoever and wheresoever, both real and personal, which I have power to dispose of by my will, to my said husband, A. C., abso-

POWER OF APPOINTMENT—*continued.*

lutely, and I appoint A. C. sole executor of this my will" :—

Held, that the daughter's will executed the special power of appointing the income of her share in favour of her second husband during his life. *In re* ACKERLEY. CHAPMAN *v.* ANDREW – – – – **Sargant J. 510**

—— Power to appoint money—Will—Trusts referring to settlement trusts—Power to appoint similar sum—Covenant to settle after-acquired property – **325**
See SETTLEMENT. 4.

—— Settlement—Settled land—Title—Sale—Compound settlement—Trustees – **561**
See SETTLED LAND. 4.

—— Whether advances to appointees valid—Release of life interest in advances—Whether life interest forfeited – **34**
See SETTLEMENT. 5.

PRACTICE—*Action tried in Chancery Division with Witnesses — Form of Order — Appeal — Schedule of Evidence — Action against Two Defendants—Submission to Judgment at Trial by One of Defendants — Dismissal of Action as against other Defendant—Evidence to be included in Schedule—Oral and Documentary Evidence —Names of Witnesses—Rules of the Supreme Court*, 1883, *Order* LXII., *r.* 14C.

Where after the trial of an action in the Chancery Division with witnesses the judgment is appealed against the schedule of evidence required by Order LXII., r. 14C, is a complete schedule of the evidence used at the trial and not merely a schedule of the evidence relative to the particular point under appeal. The schedule should contain a list of the documents used together with the names of the witnesses examined, the object of the rule being to put in a separate document where there is an appeal the evidence which under the former practice was entered in the body of the order appealed from.

General observations as to the practice to be followed in drawing up orders. JOHN BRINSMEAD & SONS, LIMITED *v.* BRINSMEAD **Warrington J. 492**

2.—— *Order declaring Priorities and for Foreclosure or Sale by Court of Appeal—Appeal to House of Lords—Enlargement of Time for Redemption—Application to Court of First Instance —Rules of the Supreme Court*, 1883, *Order* LXIV., *r.* 7.

An order of the Court of Appeal reversed in favour of the plaintiff the order of the Court below on a question of priorities, and went on to make a complete decree for an account and for redemption on payment by the defendants within a fixed time, and in default of payment for sale by the plaintiff out of Court and application of the proceeds of sale in payment of the amount due to him and costs. The defendants, who intended to appeal to the House of Lords, applied in the Court of first instance for an extension of the time fixed for redemption :—

Held, that the application was properly

PRACTICE—*continued.*

made to the Court of first instance and not to the Court of Appeal.

Hamill v. *Lilley* (1887) 19 Q. B. D. 83, and *The "Khedive"* (1879) 5 P. D. 1, distinguished. MANKS *v.* WHITELEY – **Sargant J. 581**

PRESUMPTION—Water—Artificial watercourse —Mill stream—Riparian proprietors—Common owner—Easement—Presumption from user—General words **561**
See WATER.

PRIORITY—Mortgages.
See under MORTGAGE.

PRINCIPAL AND AGENT — *Stockbroker — Open Account—Death of Client before Settling Day—Duty of Broker—Reduction of Amount of Client's Indemnity—Closing Account— Taking over of Client's Shares by Broker at a Valuation —Liability of Broker to account.*

Where there is an open account between a broker and his client, the broker is entitled, on the death of the client, to close the account at once and to sell all shares in respect of which he has entered into contracts on behalf of the client. Although the broker cannot properly sell the shares to himself, yet, when the circumstances are such that an immediate sale upon the market would be detrimental to the interests of the client's estate, the broker may, if he pleases, take over the shares at a valuation based on the market prices of the day, provided that by so doing the estate of the client is not prejudiced

Decision of Warrington J. [1913] 1 Ch. 247, affirmed.

Walter & Gould v. *King* (1897) 13 Times L. R. 270; *Macoun* v. *Erskine, Oxenford & Co.* [1901] 2 K. B. 493; and *Erskine, Oxenford & Co.* v. *Sachs* [1901] 2 K. B. 504, followed.

Ellis v. *Pond* [1898] 1 Q. B. 426, distinguished.

In re FINLAY. C. S. WILSON & CO. *v.* FINLAY **C. A. 565**

—— Money paid under mistake of fact—Right to recover—Tithe—Payment by bishop to trustee in bankruptcy – – **127**
See TITHES.

PRINCIPAL AND SURETY—*Right of Principal to Indemnity by Surety against Liability—Will —Construction—"Debts."*

A surety's equitable right to be indemnified by the principal debtor does not create any debt before the surety has been called on to pay anything under his guarantee.

Held, accordingly, that a release of "all debts" to a principal debtor by the surety's will did not affect the right of the executors to come on the principal debtor's beneficial interest under the will for indemnity against claims under the guarantee made by the creditor after the testator's death. *In re* MITCHELL. FREELOVE *v.* MITCHELL – – – **Parker J. 201**

PROFIT—Sale of Goods — Non-acceptance — Company — Winding-up — Proof — Double profit – – – **465**
See SALE OF GOODS.

PROOF—Company—Liquidation—Liability of partners—Right of double proof – 92
See COMPANY. 3.

—— Sale of goods—Non-acceptance—Company—Voluntary winding-up—Double profit
See SALE OF GOODS. 465

PROXIES—Company — Meeting — Poll — Adjournment ad hoc—No adjournment of meeting—Validity of proxies lodged forty-eight hours before poll – 292
See COMPANY. 4.

PUBLIC HEALTH—Buildings.
See under BUILDINGS.

REBUILDING — Charity — Hospital — Consecrated chapel — Rebuilding — New chapel—Effect of consecration – 518
See CHARITY. 2.

RECEIVING ORDER — Will — Construction—Forfeiture—Determinable life interest—Discharge of order – – – 298
See WILL. 2.

RECONSTRUCTION—Company.
See under COMPANY.

REDEMPTION—Mortgages.
See under MORTGAGE.

REGISTERS—Births, marriages, and deaths—Non-parochial registers — Society of Friends—Certificates of recording clerk—Admissibility – – – – 392
See EVIDENCE.

REGISTRATION — Company — Winding-up — Unregistered company — Friendly society—Jurisdiction – – – 167
See COMPANY. 11.

—— Trade mark – – – – – 191
See TRADE MARK. 2.

RENT AND OUTGOINGS—To be paid out of general estate—Leasehold house—Sale by life tenant—Ordinary application of proceeds – – – – – 277
See SETTLED LAND. 3.

REPAIR—Covenant to—Lease—Unassignability of right to damages for waste – 98
See LANDLORD AND TENANT. 1.

RETRACT—Right to—Disclaimer—Trust legacy—Successive life interests – – 272
See DISCLAIMER.

REVENUE—*Estate Duty—Incidence—Testator entitled to Reversionary Interest in Settled Fund—"Competent to dispose of"—Duty payable out of Settled Fund or Testator's Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2; *s.* 2, *sub-s.* 2; *s.* 7, *sub-ss.* 6, 7; *s.* 8, *sub-ss.* 3, 4; *s.* 9, *sub-s.* 1; *s.* 22.

Under a settlement made in 1902 certain funds were vested in trustees upon trust for the testator for life and on his death for his widow for life, and subject thereto for the testator absolutely. By his will dated in 1907 the

REVENUE—*continued.*

testator disposed of his interest in the settled funds. Upon his death in 1908, leaving his widow surviving, the question arose whether the estate duty upon the testator's reversionary interest in the settled funds was payable out of his residuary personal estate as testamentary expenses, or out of the settled funds:—

Held, reversing the decision of Warrington J., that as between the beneficiaries under the will the duty was payable out of the residuary personal estate.

In re Dixon [1902] 1 Ch. 248, overruled.
In re AVERY. PINSENT *v.* AVERY C. A. 208

2. —— *Income Tax—Deduction from Dividends before Tax imposed by Statute—Bill of Rights* (1 *W. & M. sess.* 2, *c.* 2)—*Customs and Inland Revenue Act*, 1890 (53 & 54 *Vict. c.* 8), *s.* 30—*Income Tax Assessment Act*, 1870 (33 & 34 *Vict. c.* 4), *s.* 1—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 14, 15 — *Revenue Act*, 1911 (1 *Geo.* 5, *c.* 2), *s.* 11.

A resolution of the Committee of the House of Commons for Ways and Means, assenting to income tax at a certain rate for the ensuing financial year (commencing April 6), does not either per se, or after adoption by the House of Commons, authorize the Crown to levy on the subject the tax so assented to before the tax has been actually imposed by Act of Parliament; nor can the Bank of England, before the tax is so imposed by statute, lawfully deduct any income tax from the dividends payable by the Bank to a stockholder without the assent of the holder.

The effect of s. 30 of the Customs and Inland Revenue Act, 1890, and other statutory provisions—enacted to meet the inconvenience caused by income tax being a temporary tax, when it was intended but not yet enacted that the tax should be imposed for the ensuing financial year—stated and explained. BOWLES *v.* BANK OF ENGLAND – – Parker J. 57

RIGHT OF WAY.
See under WAY, RIGHT OF.

RIPARIAN PROPRIETORS—Artificial watercourse—Mill stream—Common owner—Easement—Presumption from user General words – – – – 571
See WATER.

RULES OF THE SUPREME COURT—Order XI. (Service out of the Jurisdiction), rr. 1 (*e*), **8A** – – – – – – 254
See MORTGAGE.

Order LXII. (Registrars of the Chancery Division), r. 14C – – – 492
See PRACTICE. 1.

Order LXIV. (Time), r. 7 – – 581
See PRACTICE. 2.

SALE—Company—Resolution sanctioning sale by company of all its assets and division amongst debenture-holders accepting lowest price—Invalidity – 1
See COMPANY. 2.

SALE—*continued.*

—— Company—Sale of undertaking and assets in consideration of shares in purchasing company—Distribution of proceeds **425**
See COMPANY. 7.

—— Partition action.
See under PARTITION.

SALE OF GOODS — *Non-acceptance — Goods ordered to be manufactured — Measure of Damages — Company — Voluntary Winding-up — Proof — Double Profit.*

The Vic Company were in voluntary liquidation. Before the winding-up they had ordered certain machines to be made by a firm of engineers, which, owing to the winding-up, they were unable to accept. The creditors put in a claim for damages for 1167*l.* 13*s.* 6*d.*, being the amount of the profits which they estimated they would have made if the contract had been carried out. The liquidators rejected this claim, and Neville J. referred the matter to the district registrar for an inquiry for what sum, if any, the applicants should be allowed to prove in the winding-up in respect of the items of machinery included in their claim, ordered by the company but not delivered. The registrar divided the machines as to which claims were made into two classes: (1.) Machines which had been completed by the creditors before the date of the winding-up, retained by the creditors for a time, and then somewhat altered and sold to other customers at a price less than the contract price. On these he allowed the difference between the price realized and the contract price plus the estimated cost of the alterations, a sum amounting to 38*l.* instead of 162*l.* 19*s.* claimed. (2.) Machines which would have been wholly or partially manufactured by the creditors, on which they had done no work, but for some of which they had purchased subordinate parts ready made, which they had afterwards used in fulfilling other orders. On these the registrar thought that the creditors were entitled to have the loss of profits taken into account; but he held that the actual loss directly or naturally resulting from the breach of contract did not amount to anything approaching the whole of such prospective profit, and he assessed the damages at 280*l.* instead of the 1002*l.* 1*s.* 3*d.* claimed. There was no available market for the goods and no evidence that the claimants could not have carried out the contract as well as all their other contracts:—

Held, affirming the decision of Neville J. (reported [1913] 1 Ch. 183), that the claimants were entitled to the whole of the profits which they claimed. *In re* VIC MILL, LIMITED
C. A. 465

SCHEME OF ARRANGEMENT—Company.
See under COMPANY.

SCHOOL—Charity—Cy-près—Gift for a school—Failure of particular object — **314**
See CHARITY. 1.

SECRET PROFIT — Company — Liquidation — Liability of partners—Right of doub proof — — — — — **92**
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SERVICE — Mortgagor and mortgagee — Foreclosure summons — Service out of the jurisdiction — Action founded on "breach of contract"—Practice — **254**
See MORTGAGE.

SETTLED ESTATE.
See under SETTLED LAND.

SETTLED LAND — *Collieries — Works required by Coal Mines Act*, 1911—*Improvements—Payment out of capital—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25, *sub-ss. xix., xx.*

Upon a summons by a person having the powers of a tenant for life under the Settled Land Acts, asking that capital money under the Acts might be applied in payment of the cost of certain alterations of, and additions to, freehold and leasehold collieries (part of the settled land), required by the provisions of the Coal Mines Act, 1911:—

Held, that the works required were "improvements" within the meaning of s. 25, sub-ss. xix. and xx., of the Settled Land Act, 1882, and that the applicant was prima facie entitled to have them paid for out of capital; and the Court, in the exercise of its discretion, made the order.

The words "other preliminary works necessary or proper in connexion with development of mines" in sub-s. xix., though pointing primarily to operations incident to discovering whether minerals exist under the settled land, and to the procedure necessary or proper to enable the minerals, when their existence is proved, to be reached and worked, include also works (though not enlargements, improvements, or reconstructions within sub-s. xx.) which in the progress of working become necessary or proper for the development of a mine, "development" continuing so long as any part of the mining area remains to be opened up.

Construction of sub-ss. xix. and xx. by North J. in *In re Mundy's Settled Estates* [1891] 1 Ch. 399, adopted and applied. *In re* HANBURY'S SETTLED ESTATES — — **Eve J. 50**

2. —— *Improvements—Conversion into Building Estate—Determination of Tenancy of Farm required for Scheme—Tenant Right—Agricultural Improvements — Compensation — Capital Money—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*iii.*), (*x.*); *s.* 25 (*xvii.*), (*xviii.*); *s.* 26.

Settled land was about to be developed as a building estate, and as a necessary preliminary to carrying out the approved scheme of improvements authorized by the Settled Land Act, 1882, it was essential to obtain vacant possession of a farm let to a yearly tenant and forming an important part of the settled land in question. The tenancy was determined by notice and compensation was awarded to the tenant in respect of tenant right and improvements not coming within the First or Second Schedules to the Agricultural Holdings Act, 1908:—

Held, that neither under s. 21, (iii.) or (x.) nor under s. 25 of the Settled Land Act, 1882, could payment of the compensation in question be allowed out of capital moneys in the hands of the trustees; and that to allow such an

expenditure out of capital moneys would be entirely inconsistent with the whole purpose and scheme of the Settled Land Acts.

Decision of Joyce J. affirmed. *In re* EARL DE LA WARR'S COODEN BEACH SETTLED ESTATE - - - - - - **C. A. 142**

3. —— *Leasehold House—Specific Bequest—Rent and Outgoings to be paid out of General Estate—Sale by Life Tenant—Ordinary Application of Proceeds—Additional Allowance out of General Estate in respect of Rent and Outgoings—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 34, 51.

A testator bequeathed a leasehold house to his executors and trustees in trust to permit his wife to occupy the same during her widowhood, with a provision for payment of ground rent, rates, taxes and outgoings, execution of repairs, and performance of covenants out of the testator's general estate, it being his intention that his wife should be personally relieved therefrom.

The widow resided in the house for fourteen years from the testator's death, the outgoings, amounting to 160*l.* a year, being paid by the trustees. She then sold the house as life tenant under the Settled Land Act, 1882, and the trustees received the purchase-money :—

Held, that under s. 34 the proceeds of sale must be applied in paying the widow during widowhood such an annuity as would exhaust those proceeds, capital and income, in the remaining eleven years of the lease.

Askew v. *Woodhead* (1880) 14 Ch. D. 27, applied.

Held, also, that the widow was not entitled to be paid 160*l.* a year out of the general estate in lieu of the provision for payment of rent and outgoings, as that provision, being merely an extra benefit conferred on her to enable her to reside in the house, was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51, and consequently came to an end on the sale.

Observations of Buckley J. in *In re Trenchard*, *Trenchard* v. *Trenchard* [1902] 1 Ch. 378, followed.

In re Trenchard, *Ward* v. *Trenchard* (1900) 16 Times L. R. 525, not followed. *In re* SIMPSON. CLARKE *v.* SIMPSON

Swinfen Eady J. 277

4. —— *Settlement—Power of Appointment—Title—Sale—Compound Settlement — Trustees—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), s. 2, *sub-ss.* 1, 5, 8 ; *s.* 38.

By his will the testator appointed trustees, and empowered his wife, by deed or will, to appoint and dispose of all or any part of his property, and in default he gave all his freehold estates to his wife for life, with remainder to the use of W. P. G. for life, with remainders over. The trustees had a power to sell any part of the freehold estates. The testator died in 1891, and by her will his widow appointed W. P. G. her sole executor, and in exercise of her power of appointment appointed the real estate devised by her husband's will to the use of W. P. G. for life, with remainder to the use of his first and every other son successively in tail male, with remainders over. The widow having died, W. P. G., as tenant for life in possession, contracted to sell part of the settled estate. Upon an objection being taken by the purchaser that the vendor could not make a good title until trustees of the compound settlement for the purposes of the Settled Land Acts were appointed :—

Held, that the limitations contained in the widow's will must be read into the will which created the power ; and inasmuch as there were still trustees of the first will for the purposes of the Settled Land Acts, a good title could be made without any further appointment of trustees. *In re* GORDON AND ADAMS' CONTRACT. *In re* PRITCHARD'S SETTLED ESTATE

Eve J. 561

—— Estate duty.
See under REVENUE.

—— Partition action—Infant—Request for sale—Sale for infant's benefit—Conversion
See PARTITION. **284**

—— Tenant for life and remainderman—Shares in company — Reserve fund — Bonus dividend—New shares—Option - **23**
See SETTLEMENT. 6.

SETTLEMENT — *After-acquired Property — Covenant to settle — Acquisition of Property — Effect of Covenant in Equity—Persons within Marriage Consideration — Non-assignment of Property—Remedies of Trustees—Lapse of time—Statutes of Limitation — Marriage Settlement.*

A marriage settlement of 1859 contained the usual covenant by the husband and wife to settle the wife's after-acquired property of the value of 100*l.* or upwards.

In 1879 the wife received 285*l.* and paid it into her husband's banking account, on which she had power to draw. Part of it was shortly after invested in two bearer bonds which remained at the bank till the husband's death in 1909 and were now in his executors' possession :—

Held, that the moment the wife received the 285*l.* it was specifically bound by the covenant and was consequently subject in equity to a trust enforceable in favour of all persons within the marriage consideration, and therefore, notwithstanding the lapse of time, the trustees were entitled on behalf of those persons to follow and claim the bonds as trust property though their legal remedy on the covenant was statute-barred.

Principles stated in *Smith* v. *Lucas* (1881) 18 Ch. D. 531, 543 ; *Collyer* v. *Isaacs* (1881) 19 Ch. D. 342, 351 ; and *In re D'Angibau* (1880) 15 Ch. D. 228, 242, applied.

Spickernell v. *Hotham* (1854) Kay, 669, 675, and *In re Plumptre's Marriage Settlement* [1910] 1 Ch. 609, 616, distinguished. PULLAN *v.* KOE

Swinfen Eady J. 9

SETTLEMENT—*continued.*

2. —— *Hotchpot Clause—Several Settled Funds — Trusts by Reference — Settlement by Will—Construction.*

A testator gave three separate funds to trustees upon trusts, fully set out in each case, for his three children respectively for life, with remainder to their issue as they should respectively appoint, and in default of appointment to their respective children in equal shares with a hotchpot clause. In each case the testator gave the fund over, on failure of the express trusts, upon trusts in favour of his other children and their issue successively, by reference to the trusts expressly declared in favour of such children and their issue concerning the fund given in trust for them in the first instance.

In the events which happened, a granddaughter of the testator became entitled to one fund by appointment, and to a share in another fund in default of appointment :—

Held, that she was entitled to take her share in the unappointed fund without bringing into hotchpot the appointed fund.

Held, also, that there is no general rule of construction that when a testator settles a fund on certain trusts with a hotchpot clause, and by the same will settles a second fund by reference to the trusts of the first, he intends to make one fund with a hotchpot clause extending over the whole. In every such case it is a question of construction upon the whole will.

In this respect there is no difference between the construction to be applied to words used in a will and words used in a deed.

In re Marquis of Bristol [1897] 1 Ch. 946, and *In re Cavendish* [1912] 1 Ch 794, followed.

In re Perkins (1893) 67 L. T. 743, discussed. *In re* MARKE WOOD, SENIOR. *In re* MARKE WOOD, JUNIOR. WODEHOUSE *v.* WOOD **Neville J. 303**

3. —— *Portions—Vesting—Younger Children —"Eldest or only son"—Younger Son becoming Eldest after vesting of Portion—Right to share in Portions Fund—Settled Estate—Settlement—Construction.*

By a marriage settlement made in 1828 real estate was limited to trustees upon trust to raise portions for the younger children of the marriage, such portions to vest at twenty-one in the case of sons, or, in the case of daughters, at twenty-one or marriage under that age. The settlement further provided that if any of the children for whom portions were intended, being a son or sons, should die under twenty-one, "or should, before attaining such age, become an eldest or only son," then the share in the portions fund of the child so dying, or of the son so becoming an eldest or only son, was to go to the survivors or survivor who should live to attain a vested interest therein. G. W., a younger son of the marriage, in whom a share in the portions fund became vested by his attaining twenty-one in his father's lifetime, subsequently became the eldest son by the death of his elder brother in the lifetime of his father :—

Held that, according to the true construction of the settlement, G. W. was a younger son for the purpose of participating in the portions fund, the position of the son in the family having to be determined at the moment when his share vested.

Windham v. *Graham* (1826) 1 Russ. 331, followed.

In re Bayley's Settlement (1870) L. R. 9 Eq. 491 ; (1871) 6 Ch. 590, considered. *In re* WISE'S SETTLEMENT. SMITH *v.* WALLER – **Eve J. 41**

4. —— *Power to appoint Money—Will—Trusts referring to Settlement Trusts—Power to appoint Similar Sum—Covenant to settle after-acquired Property.*

By a settlement, made on the marriage of B., she was empowered to appoint that the trustees of the settlement should raise out of the settled fund any sums not exceeding in the whole 2000*l.* and pay the same to B. for her separate use. The settlement contained a covenant by B. to settle any after-acquired property of the value of 200*l.* or upwards.

The father of B., who died in her lifetime, gave a fourth of his residuary estate in trust for each of his two daughters, and directed his trustees to hold the shares "upon the same trusts and with and subject to the same powers, including the powers of investment, as are in their respective marriage settlements contained with respect to the funds thereby settled."

There were separate settlors, separate funds, and separate sets of trustees :—

Held, (1.) that B. was entitled to raise by appointment, out of her share of residue, the sum of 2000*l.*; but (2.) that the 2000*l.* was subject to the covenant as to after-acquired property.

Irew v. *Perpetual Trustee Co.* [1895] A. C. 264 ; *Hindle* v. *Taylor* (1855) 5 D. M. & G. 577 ; *Cooper* v. *Macdonald* (1873) L. R. 16 Eq. 258 ; and *Baskett* v. *Lodge* (1856) 23 Beav. 138, distinguished. *In re* BEAUMONT. BRADSHAW *v.* PACKER – – – – **Farwell L.J. 325**

5.——*Protected Life Interest — Power of Appointment amongst Children—Advancement Clause—Appointed Shares—Whether Advances to Appointees valid—Release of Life Interest in Advances—Whether Life Interest forfeited.*

By a marriage settlement made in 1865 the income of the wife's fortune was settled upon trust as to part thereof for the wife for life and as to the other part thereof for the husband for life or until bankruptcy or alienation or his doing some act whereby the same or some part thereof would become vested in or payable to some other person. Subject to the trusts aforesaid the husband's and wife's fortunes were settled upon trust (in the events which happened) for their children in such shares "and with such provisions for their respective maintenance, education, and advancement" as the husband and wife should by deed jointly appoint, and in default of such appointment for the children equally at twenty-one or marriage. Then followed the usual advancement clause.

In 1896 the husband and wife by deed appointed one equal ninth share of the trust funds to a son on his marriage and the appointed share was settled, and in 1897 they by deed

SETTLEMENT—*continued.*

appointed another equal ninth share to another son on his marriage and the appointed share was settled. Neither of these appointments contained an advancement clause. Subsequently the trustees of the 1865 settlement in exercise of their power of advancement raised 4000*l.* out of their trust funds in respect of each appointed share and paid the same to each of the son's marriage settlement trustees, and the husband and wife released their respective life interests in each of the sums so advanced :—

Held, that the appointments must be read into the original settlement and that the advancement clause applied to appointed as well as to unappointed shares.

M'Mahon v. *Gaussen* [1896] 1 I. R. 143, approved and followed.

Held, also, that the husband by releasing his life interest in the sums advanced did not thereby forfeit his life interest under the settlement. *In re* HODGSON. WESTON *v.* HODGSON
Neville J. 34

6. —— *Tenant for Life and Remainderman —Shares in Company—Reserve Fund—Bonus Dividend — New Shares — Option — Capital or Income.*

The capital of a company was divided into 10,000 shares of 10*l.* each, of which 3728 shares only had been issued and were fully paid up. The company was very prosperous and the market value of its shares was 30*l.* each. In February, 1912, the reserve fund of the company exceeded 50,000*l.*, and the directors proposed a scheme for distributing part of the reserve fund, representing accumulated undivided profits, amongst the shareholders, so that every shareholder would get a bonus of one new fully-paid 10*l.* share for every existing share held by him. Accordingly, resolutions were passed by the company (*a*) empowering the directors to declare a bonus dividend out of the reserve fund, and (*b*) sanctioning the distribution of a bonus dividend of 10*l.* per share out of the reserve fund, authorizing the further issue of 3728 shares of 10*l.* each out of the unissued capital of the company to be allotted pro rata amongst the existing shareholders, and directing that such new shares be paid up in full forthwith. The directors then sent a circular letter to every shareholder with a warrant for the bonus dividend on his shares, informing him of an allotment to him of his proportion of the new shares and giving him an option to accept or refuse the allotment, and stating that if he accepted the allotment he was to indorse and return the dividend warrant to the company to be applied in payment of the new shares. Trustees of a testator's will held 200 shares of the company and, on receipt of the circular letter, accepted their allotment of 200 new shares, indorsed and returned their bonus dividend warrant for 2000*l.*, and afterwards sold the new shares at a profit. The question then arose whether, as between the tenants for life and remainderman under the will, the bonus dividend was capital or income :—

Held, on the evidence, that the company intended to capitalize the reserve fund and not to distribute it as a bonus dividend, and therefore that the whole of the bonus dividend was capital of the testator's estate.

The principle of *Bouch* v. *Sproule* (1887) 12 App. Cas. 385, applied. *In re* EVANS. JONES *v.* EVANS – – – – **Neville J. 23**

—— Divorce—Decree nisi—Covenant to settle after-acquired property — Property, whether caught by covenant – **155**
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—— Estate duty — Incidence — Duty payable out of settled fund or testator's residue
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—— Settled land — Power of appointment— Title — Sale—Compound settlement — Trustees – – – – – **561**
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SOLICITOR—*Costs—Solicitor and Client—Conveyancing Costs — Taxation — Abortive Sale— No subsequent Sale—Scale Fees—Item Charges —Amendment of Bill delivered—General Order under Solicitors Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 2, *sub-ss.* (*a*), (*c*) ; *Sched. I., Part I., r.* 2 ; *Sched. II.*

There is no inconsistency between the provisions in Part I. of Sched. I. to s. 2 (*a*) and those in s. 2 (*c*) and Sched. II. of the General Order to the Solicitors Remuneration Act, 1881, with respect to conveyancing business. Sect. 2 (*a*) and Sched. I., Part I., prescribe the scale of charges for a completed sale and also for an ineffectual sale which is afterwards followed by a completed sale. Sect. 2 (*c*) and Sched. II. prescribe the scale of charges where there has been an abortive sale not followed by a subsequent sale.

Where on taxation of a solicitor's bill of costs he finds that he has made an error in the bill delivered and has charged for certain items on the wrong scale, he may be allowed to lodge an amended bill of item charges in the particular matter, provided that the aggregate of the item charges in the amended bill when taxed are, if necessary, reduced to the aggregate amount of the items improperly charged in the bill first delivered. *In re* STEAD. SMITH *v.* STEAD
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Where tithe rent-charge was paid by the plaintiffs, under a mistake of fact, to the sequestrator of a benefice appointed by an order made by the bishop under s. 52 of the Bankruptcy Act, 1883, and was received and applied by the bishop, who had no notice of the mistake, first in providing for the spiritual needs of the benefice, and then in payment of the balance to the trustee in bankruptcy of the incumbent:—

Held, that the bishop, as between himself and the plaintiffs, was in the position of a principal, and, as such, was liable to repay the amount so received and applied by him.

Decision of Neville J. [1912] 2 Ch. 318, affirmed. BAYLIS *v.* BISHOP OF LONDON
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TITLE—Settlement — Settled land — Power of appointment—Title — Sale—Compound settlement—Trustee – – – **561**
See SETTLED LAND. 4.

TRADE DISPUTES.
See under TRADE UNION.

TRADE MARK—*Registration—Special Application — Surname — "Boardman's"—"Distinctive Mark"—"Adapted to distinguish"—User —Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* (5.); *s.* 44.

Previous to 1868 R. J. Lea, a tobacconist, had supplied to one Boardman, a licensed victualler in Manchester, a tobacco mixture which became known and was asked for as "Boardman's" mixture. In 1868 R. J. Lea, with Boardman's sanction, began to sell this mixture to the public under a label bearing the words "Boardman's Smoking Mixture" in addition to other matter, including the name, address, and a trade mark device of R. J. Lea. This label was registered in 1887 as a whole for "tobacco being a smoking mixture." In 1910 R. J. Lea, Limited, the successors in business of R. J. Lea, applied to register the word "Boardman's" under s. 9 (5.) of the Trade Marks Act, 1905, as a trade mark in respect of manufactured tobacco. There was evidence that in a limited market among persons who knew and liked the mixture it was known and spoken of as "Boardman's," and that the word had been used as a trade mark in connection with goods for the purpose of indicating that they were the goods of the applicants. The application having been referred to the Court by the Board of Trade, it was dismissed by Joyce J. on the ground, inter alia, that a mere surname of an individual applicant, though it might be adapted to distinguish the goods of all the persons, taken collectively, who bore that surname from the goods of other persons bearing a different surname, was not adapted to distinguish the goods of the applicant from those of other persons within the meaning of that expression in the Act, and ought not, therefore, to be registered under s. 9 (5.). On appeal from that decision :—

Held, without deciding whether a surname was registrable per se, that on the evidence the word "Boardman's" was not "adapted to distinguish" the goods of the applicants from those of other dealers in tobacco, and was not therefore registrable as a "distinctive mark" within s. 9 (5.) of the Act.

Decision of Joyce J. [1912] 2 Ch. 32, affirmed.
In re AN APPLICATION OF R. J. LEA, LIMITED, FOR REGISTRATION OF A TRADE MARK
C. A. 446

2. —— *Registration—Special Application to register Surname—Order of Board of Trade directing Registrar to proceed with Application —Application to remove Mark from Register—Effect of Order of Board of Trade—Jurisdiction of Court to entertain Application—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* 5—*Trade Marks Rules*, 1906, *r.* 41.

In 1909 Teofani & Co., Limited, obtained an order of the Board of Trade under s. 9, par. 5, of the Trade Marks Act, 1905, directing the Registrar of Trade Marks to proceed with a special application to register its trade mark "Teofani," which was the family name of one of the predecessors in business of the company, and the mark was subsequently registered. On an application under s. 35 of the Act by a person name Teofani for an order that the register might be rectified by the removal therefrom of the company's trade mark :—

Held, that the order of the Board of Trade, having been made by a tribunal of co-ordinate jurisdiction with the Court, was final and conclusive, and that the Court had no jurisdiction to entertain the application. *In re* TEOFANI & CO.'S TRADE MARK – – **Warrington J. 191**

TRADE MARKS RULES, 1906, r. 41 – 101
See TRADE MARK. 2.

TRADE UNION—*Rules—Parliamentary Levies —Expulsion of Member—Ultra vires—Injunction—Unregistered Association—Parties—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *ss.* 4, 6, 13 —*Trade Union Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 8—*Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4.

The Trade Union Act, 1871, s. 6, which declares that if any one of the purposes of a registered trade union is unlawful the registration shall be void, and s. 13, which provides that the certificate of registration, unless withdrawn or cancelled, shall be conclusive evidence that the regulations of the Act have been complied with, must be read with the Trade Union Act, 1876, s. 8, which empowers the Registrar of Friendly Societies to withdraw or cancel the certificate of registration of a trade union on proof "that the registration of the trade union has become void under section 6 of the Trade Union Act, 1871." Where, therefore, any of the purposes of a registered trade union are ultra vires it can properly be sued in its registered name until its certificate of registration has been withdrawn or cancelled by the registrar.

The committee of a trade union passed a resolution purporting to expel one of its members from the union. To an action by the member to restrain the union and its officers from wrongfully expelling him from the union the defendants pleaded that the action was not maintainable because the expulsion was a tortious act done in furtherance of a trade dispute within s. 4 of the Trade Disputes Act, 1906 :—

Held, that s. 4 of the Trade Disputes Act, 1906, did not apply to the case of a plaintiff suing in respect of a breach of his contractual rights under the rules of the union.

An unregistered association consisted of numerous trade unions and their members. One of its objects, as defined by its rules, was illegal. Under its rules it had a president, vice-president, treasurer and secretary, and its affairs were managed by an executive committee and its funds were vested in trustees. In an action by a member to restrain the application of the funds of the association to illegal purposes the president, vice-president, treasurer, and secretary were made defendants and objected that they did not represent the association, and that the

TRADE UNION—*continued.*

plaintiff should have sued the executive committee and the trustees :—

Held, that the defendant officials sufficiently represented the association for the purposes of the action. PARR *v.* LANCASHIRE AND CHESHIRE MINERS' FEDERATION
Neville J. 366

—— Maintenance of suit—Common interest—Slander on officer as such—Action by officer—Indemnity by union against costs—Ultra vires – – – **259**
See MAINTENANCE OF SUIT.

TRAMWAY COMPANY—*Abandonment—Deposit—Landowner—Compensation—Statutory Obligation — Obligation to construct Works "unless otherwise agreed"—"To the reasonable satisfaction of" another—Construction.*

A private Act of Parliament authorized a company to construct a tramway and other works. It provided (inter alia) that, "unless otherwise agreed in writing between" the district council and the company, the company should commence and complete the tramway within two years, and "carry out to the reasonable satisfaction of the council the widenings" authorized by the Act. No such agreement in writing was entered into :—

Held, reversing the decision of Warrington J., that until an agreement altering the scheme of works was made there was an absolute statutory obligation on the company to do the works, and that a landowner whose property had been rendered less valuable by the abandonment of the undertaking was entitled to compensation out of the parliamentary deposit.

In re Ruthin and Cerrig-y-Druidion Railway Act (1886) 32 Ch. D. 438, followed. *In re* WEST YORKSHIRE TRAMWAYS ACT, 1906
C. A. 170

TRANSFER—Company—Winding-up—Pending action in King's Bench Division—Transfer to winding-up Court—Practice – – – – – **218**
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TRUST—Settlement—Power to appoint money—Will—Trusts referring to settlement trusts—Power to appoint similar sum—Covenant to settle after-acquired property – – – – – **325**
See SETTLEMENT. 4.

—— Settlement by will—Construction—Hotchpot clause — Several settled funds—Trusts by reference – – – **303**
See SETTLEMENT. 2.

TRUST DEED — Power of modification—Company – – – – – **1**
See COMPANY. 2.

TRUSTEE—*Investment—Mortgage—Breach of Trust—Insufficient Security—Property let on Weekly Tenancies—Duty of Trustees to inquire as to Nature of Property and Financial Position of Mortgagor—Valuer, Employment of—Duty of Trustees to inquire as to previous Dealings with*

TRUSTEE—*continued.*

Mortgagor—Duties of Valuer—Remuneration—"Two-thirds" Limit—Form of Report—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 8, *sub-s.* 1.

Order made by consent discharging the order of Warrington J. [1912] 1 Ch. 261, and substituting certain terms which had been agreed upon by the parties. *In re* SOLOMON. NORE *v.* MEYER – – – – – – **C. A. 200**

—— Settlement — Settled land — Power of appointment—Title—Sale—Compound settlement—Trustees – – **561**
See SETTLED LAND. 4.

ULTRA VIRES—Building society—Winding-up—Pensions—Proofs—Voluntary allowance – – – – – – **400**
See BUILDING SOCIETY.

—— Trade union—Rules—Parliamentary levies—Expulsion of member—Injunction—Unregistered association—Parties **366**
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—— Trade union—Slander on officer as such—Action by officer—Indemnity by union against costs – – – – **259**
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USER — Easement — Presumption from user — Water — Artificial watercourse — Mill stream—Riparian proprietors—Common owner—General words – – **571**
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—— Trade mark—Registration—Surname **446**
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—— Way, Right of—Change of condition—Alteration of user—Increase of burden
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VESTING — Portions — Younger children—"Eldest or only son" — Younger son becoming eldest after vesting of portion—Right to share in portions fund **41**
See SETTLEMENT. 3.

VOLUNTARY GIFT—Deed of gift.
See under DEED OF GIFT.

VOLUNTARY WINDING-UP—Company.
See under COMPANY.

WASTE—Lease—Covenant to repair—Unassignability of right to damages for waste
See LANDLORD AND TENANT. 1. **98**

WATER—*Artificial Watercourse—Mill Stream — Riparian Proprietors — Common Owner — Easement — Presumption from User — Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 6—*General Words.*

An artificial watercourse, constructed long

WATER—*continued.*

before living memory, carried water from a weir in the river Arran at Dolgelly to a mill owned by the defendant lower down the river. The plaintiff owned land adjoining the watercourse between the intake and the mill. For more than 100 years prior to 1908 the lands of the plaintiff and defendant belonged to a common owner, but the tenants had always been different. In 1908 the plaintiff's land and the mill were conveyed to the predecessors in title of the plaintiff and defendant respectively; the conveyance to the plaintiff's predecessor was silent as to any water rights; the conveyance to the defendant's predecessor contained a grant of the flow of water as used and enjoyed. There was evidence that the tenants of the plaintiff and his predecessors had always used the water from the watercourse for the purposes of their respective businesses of a fellmonger and a mason's yard, but the tenants of the mill had always kept it in repair, had stopped the water altogether when necessary for repairs, and to some extent controlled the flow of water. The defendant had taken up the troughs which formed the original watercourse and substituted iron pipes from which the plaintiff's tenants could get no water. There was a dispute whether the plaintiff's land included the site of the watercourse :—

Held, on the facts, that the land upon which the watercourse opposite the plaintiff's land was constructed was comprised in the conveyance to the plaintiff, and that the true inference from the user of water was that the watercourse was originally constructed for the common benefit of all the tenants, and that the quasi-easements enjoyed by the plaintiff's tenants during the common ownership had passed to the plaintiff by virtue of the general words in s. 6 of the Conveyancing Act, 1881; and that therefore the defendant's removal of the old troughs and substituting the iron pipes was a trespass, and an inquiry as to damages must be directed. LEWIS *v.* MEREDITH - - - - **Neville J. 571**

WATERCOURSE.

See under WATER.

WAY, RIGHT OF — *Injunction — Easement — Right of Way—Restriction—Change of Condition —Alteration of User—Increase of Burden.*

A right of way granted for general purposes is not to be restricted to access to the land merely for such purposes as were reasonably required at the date of the grant; therefore a right of way for general purposes to a private dwelling-house is not affected by the house being turned into an hotel.

United Land Co. v. *Great Eastern Ry. Co.* (1875) L. R. 10 Ch. 586, followed.

Decision of Joyce J. affirmed with partial variation. WHITE *v.* GRAND HOTEL, EASTBOURNE, LIMITED - - - - **C. A. 113**

—— Public right of way—Assertion of right by district council—Action by landowner for declaration and injunction—Reasonable cause of action - - - **438**

See LOCAL GOVERNMENT.

WILL—*Devise—Trust to convey to Uses subsisting in another Estate at Death of Tenant for Life—Rule against Perpetuities.*

Testator was tenant for life in possession of the W. estate and owner in fee of the D. estates. By his will he devised his D. estates to trustees upon trust to pay the rents and profits to his wife during her life and after her decease upon trust to raise two sums of 4000*l.*, and subject thereto upon trust to assure the said estates "to such uses for such estates and with and subject to such powers and provisoes as under and by virtue of" two deeds of July 5, 1854, and February 26, 1859, "and all mesne assurances acts and operations of law" should at the time of the death of his wife be subsisting and capable of taking effect of and concerning the W. estate. The testator died in 1875, and shortly afterwards there was a resettlement of the W. estate. The widow died in 1912. At her death there was nothing in the then subsisting uses, powers, and provisoes of the W. estate which if inserted in the testator's will would have given rise to objection on the ground of remoteness :—

Held, reversing the decision of Eve J., that the trusts declared of the D. estates after the death of the widow were valid.

Per Buckley L.J. : *Lord Dungannon* v. *Smith* (1846) 12 Cl. & F. 546, is not an authority for the proposition that the rule against perpetuities is infringed by uncertainty at the testator's death whether the limitations introduced by reference will or will not exceed the rule. *In re* FANE. FANE *v.* FANE - - - - **C. A. 404**

2. ——*Forfeiture—Determinable Life Interest —Till Tenant for Life "have his affairs liquidated by arrangement or composition"—Or his Income or Part thereof "become payable to some other person"—Will—Construction—Receiving Order —Discharge of Order—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126—*Bankruptcy Rules*, 1886, *r.* 208.

Where a life interest in a trust fund is to determine on the happening of any event whereby the income or any part thereof would, if belonging absolutely to the tenant for life, become "payable to some other person," the life interest determines if a receiving order is made against the tenant for life and any income comes to the hands of the trustees before it is discharged.

Whether the same result will follow if no income comes to hand while the receiving order is in force, *quære.*

In re Sartoris' Estate [1892] 1 Ch. 11, explained and followed.

A testator, who made his will and died in 1883, directed trustees to pay the income of a trust fund to a son until he should die or "have his affairs liquidated by arrangement or composition," or do or suffer something whereby the income or part thereof would if belonging absolutely to him "become payable to some other person." In December, 1910, a receiving order was made against the son. In February, 1911, the creditors having accepted a scheme for payment by instalments of their debts in full with provision for a composition of 7*s.* 6*d.* in the event of the debtor's death, the Court discharged the

order. Upon a summons to determine whether the debtor had forfeited his life interest :—

Held, that the debtor was not by the scheme "having his affairs liquidated by arrangement or composition," those words contemplating liquidation by arrangement or composition as recognized by the Bankruptcy Act, 1869 ; but that, assuming that while the receiving order was in force moneys payable to the debtor came to the trustees' hands, the receiving order operated to make those moneys "payable to some other person," and a forfeiture of the life interest had taken place. *In re* LAYE. TURNBULL *v.* LAYE **Eve J. 298**

3. —— *Legacy—Bequest of Shares or of Money to buy the Shares—Shares in Private Company — Dividend, whether apportionable— "Public Company" — Will — Construction — Apportionment Act*, 1870 (33 *&* 34 *Vict. c.* 35), *ss.* 2, 5—*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 121.

The term "private company" in s. 121 of the Companies (Consolidation) Act, 1908, is only a convenient way of describing, for the purposes of that Act, a particular class of companies subject to the Act ; and a company incorporated under the Companies Acts either before or after that Act, and so constituted, either originally or by subsequent alteration of its articles, as to be a private company within the meaning of that expression in s. 121 of the Act, is nevertheless a "public company" for the purposes of the Apportionment Act, 1870.

A company, incorporated in 1899 under the Companies Acts, 1862 to 1898, passed special resolutions in 1907 altering its articles of association so as to be a private company as defined by s. 37 of the Companies Act, 1907, which enactment is repealed and reproduced by the Companies (Consolidation) Act, 1908, s. 121. G. and his son held ordinary shares in the company. One of the articles of the company provided that, on the death of G., his son should have the right to purchase so many ordinary shares of G. as would make up the son's holding to 667 ordinary shares ; and another article provided that H. should have the right to purchase so many of G.'s ordinary shares as the son should not purchase under the previous article.

G. died and by his will bequeathed so many of his ordinary shares in the company to his son as would make up the son's holding to 667 shares, but if any provision in the articles of the company might so operate as to prevent the said specific bequest taking effect then in lieu thereof he bequeathed to his son a legacy equal in amount to the purchase-money of so many of his (the testator's) ordinary shares as the son should be entitled to purchase under the aforesaid article. The company paid substantial dividends :—

Held, that the bequest to the son did not operate as a specific gift of shares but as a gift of money to buy the shares, and therefore that the Apportionment Act, 1870, did not apply to the accruing dividend on the shares. *In re* WHITE. THEOBALD *v.* WHITE – **Neville J. 231**

4. —— *Legal Devise—Technical Words—A. and "his issue male in succession"—Words of Explanation — Intended Devolution explained —Technical Words unexplained—Rule of Construction—Estate Tail.*

Technical words of devise must be construed in their technical sense unless the context clearly shews in what other sense the testator intended to use them.

If actually used in their technical sense, they must be given their proper legal effect, however inconsistent with the testator's expressed intention as to the devolution of his estate.

A testator devised his real estate to the plaintiff, a bachelor, "and his issue male in succession, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male, and on failure of such issue" over.

This devise was followed by a name and arms clause requiring every person "entitled in possession as beneficial tenant for life or in tail under the limitations herein contained" to assume the testator's name and arms :—

Held, that the plaintiff was entitled to an estate in tail male in possession.

Jesson v. *Wright* (1820) 2 Bli. 1, 57 ; *Roddy* v. *Fitzgerald* (1858) 6 H. L. C. 823, 872, 877 ; *Van Grutten* v. *Foxwell* [1897] A. C. 658, 672, 684 ; and *In re Keane's Estate* [1903] 1 I. R. 215, 224, 225, applied. *In re* SIMCOE. VOWLER-SIMCOE *v.* VOWLER – **Swinfen Eady J. 552**

5. *Realty—Devise—Life Estate—Remainder to "my nearest male heir"—"My nearest and eldest male relative"—No Male Heir—Heiress-at-Law—Intestacy—Will—Construction.*

The testator, a bachelor, devised real estate to a trustee and his heirs in trust to pay the rents and profits to H. H. M. for life and after his decease to convey, assign, and assure the same "unto my nearest male heir and should there be two or more in equal degrees of consanguinity to me then I direct the said" trustee "to convey assign and assure the same unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my eldest male relative." The testator bequeathed the residue of his personal estate to his trustee in trust for H. H. M. for life, expressing a desire that he should not mortgage or anticipate the same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value "and keeping up the remainder in trust for my nearest and eldest male relative" who should be such at the death of H. H. M.

The defendant Mrs. W. was the heiress-at-law of the testator both at his death and the death of H. H. M.

The nearest male relative of the testator at the time of his death was the son of a female first cousin, and at the time of H. H. M.'s death was the son of a daughter of the same cousin :—

Held, affirming the decision of Joyce J.

WILL—*continued.*

[1912] 2 Ch. 430, that the devise failed and the testator's heiress-at-law was entitled. *In re* WATKINS. MAYBERY *v.* LIGHTFOOT C. A. 376

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—— "Company, Public" – – – 231
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